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## Lessons from the NBA Lockout: Union Democracy, Public Support, and the Folly of the National Basketball Players Association

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## LESSONS FROM THE NBA LOCKOUT: UNION DEMOCRACY, PUBLIC SUPPORT, AND THE FOLLY OF THE NATIONAL BASKETBALL PLAYERS ASSOCIATION

MATTHEW J. PARLOW\*

### *Abstract*

*By most accounts, the National Basketball Players Association (NBPA)—the union representing the players in the NBA—conceded a significant amount of money and other contractual terms in the new ten-year collective bargaining agreement<sup>1</sup> (2011 Agreement<sup>2</sup>) that ended the 2011 NBA lockout. Player concessions were predictable because the NBA's economic structure desperately needed an overhaul. The magnitude of such concessions, however, was startling. The substantial changes in the division of basketball-related income, contract lengths and amounts, salary cap provisions, and revenue sharing rendered the NBA lockout—and the resulting 2011 Agreement—a near-complete victory for the owners. Several interpretations have been offered to explain the lopsided deal,*

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1. The collective bargaining agreement is the “supreme governing authority” concerning employment” in the employer-employee or ownership-labor relationship—including in professional sports; it is the result of negotiations in the collective bargaining process as provided for by the National Labor Relations Act. Michael A. Mahone, Jr., *Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League's Revised Personal Conduct Policy*, 11 VAND. J. ENT. & TECH. L. 181, 192 (2008).

2. See Nat'l Basketball Ass'n & Nat'l Basketball Players Ass'n, NBPA Collective Bargaining Agreement (Dec. 11, 2011) (on file with author) [hereinafter 2011 Agreement].

*including the financial strain on players during the lockout and the players' emotional reactions to the negotiations. These justifications are intriguing, particularly in light of the racial overtones that marked the entire process. These explanations have significant merit, but they fail to completely account for why the NBA players agreed to such drastically unfavorable terms. This article provides a fuller analysis of how this surprising result came about. In doing so, it takes an interdisciplinary approach using communications and industrial relations scholarship that highlight the critical importance of intra-union communications, public relations campaigns, and union democracy. Through this analysis, this article not only assesses the missteps of the NBPA during the NBA lockout, but also provides guidance to professional sports unions for future collective bargaining negotiations during periods of labor unrest.*

### *I. Introduction*

When the National Basketball Association (NBA) team owners locked out the players in the summer of 2011,<sup>3</sup> it did not come as a surprise to even the most casual of observers. The economic structure of the league was badly outdated and in need of revision.<sup>4</sup> Moreover, the Great Recession<sup>5</sup> accelerated the financial dysfunction of the NBA.<sup>6</sup> Given this situation, it

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3. The term “lockout” in the context of labor and employment law refers to the “bargaining mechanism in which an employer refuses to allow its unionized employees to work—while at the same time withholding their salaries—in order to gain leverage over the union during labor negotiations.” Nathaniel Grow, *Decertifying Players Unions: Lessons from the NFL and NBA Lockouts of 2011*, 15 VAND. J. ENT. & TECH. L. 473, 474 n.3 (2013) (citing C. Quincy Ewell, Comment, *The Key to Unlocking the Partial Lockout: A Discussion of the NLRB's Decisions in Midwest Generation and Bunting Bearings*, 112 PENN. ST. L. REV. 907, 913 (2008)).

4. See Howard Beck, *Powerful Agent's Blunt Warning About Future of the N.B.A.*, N.Y. TIMES, Feb. 22, 2009, at D1, available at [http://www.nytimes.com/2009/02/23/sports/basketball/23falk.html?\\_r=0](http://www.nytimes.com/2009/02/23/sports/basketball/23falk.html?_r=0) (citing NBA power agent David Falk describing how the NBA's financial system was broken in 2009 and what that meant for the renegotiation of the collective bargaining agreement in 2011).

5. For the purposes of this article, the term “Great Recession” will refer to the significant economic downturn that affected the United States and global economies beginning in 2007. See generally Catherine Rampell, *'Great Recession': A Brief Etymology*, N.Y. TIMES, Mar. 11, 2009, <http://economix.blogs.nytimes.com/2009/03/11/great-recession-a-brief-etymology/>.

6. See generally Matthew J. Parlow, *The NBA and the Great Recession: Implications for the Upcoming Collective Bargaining Renegotiation*, 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 195 (2010); Jim Souhan, *NBA's Dysfunctional Finances Might Mean a Long Lockout*, STAR TRIB. (Minneapolis), June 30, 2011, <http://www.startribune.com/>

was clear that the negotiations over the 2011 Agreement would be contentious.

The owners claimed that a majority of them were losing money each year.<sup>7</sup> Accordingly, they demanded major concessions from the players for the 2011 Agreement.<sup>8</sup> The National Basketball Player's Association (NBPA) contested this claim, arguing that owners suffered merely "accounting losses rather than cash going out the door."<sup>9</sup> From the NBPA's perspective, then, only modest updates to the terms of the existing collective bargaining agreement (2005 Agreement<sup>10</sup>) were needed.<sup>11</sup> The ensuing negotiations focused on the division of the league's revenue between the owners and players, contract lengths and amounts, salary cap provisions, and revenue sharing among the teams.<sup>12</sup> Ultimately, the parties were unable to come to terms, and the NBA team owners locked out the players on June 30.<sup>13</sup>

The lockout ended after 161 days, when the two sides finally settled on the new ten-year 2011 Agreement.<sup>14</sup> By nearly all accounts, the players fared poorly in this deal. Compared to the 2005 Agreement, the players made dramatic concessions on each of the aforementioned negotiating terms.<sup>15</sup> This result was startling for a variety of reasons. After all, players' unions were some of the only private-sector unions to increase their

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sports/wolves/124826679.html (describing the financial problems with the 2005 Agreement).

7. See Lance Taubin, Note, *Welcome to the Real 2011 NBA Lockout: Where Owner-Friendly Tax Provisions and Non-Monetized Benefits Color the Lockout Landscape*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 139, 140-41 (2012).

8. See John R. Sigety, *The Cost of Fair Play: An Examination of How Salary Cap Proposals Have Affected Past Collective Bargaining Agreements and Will Affect the Coming NBA Collective Bargaining Negotiations*, WILLAMETTE SPORTS L.J., Fall 2011, at 23, 45.

9. Milad Sedeh, *The N.B.P.A. Disclaimer: The End of the Bargaining Relationship or a Sham?*, WILLAMETTE SPORTS L.J., Spring 2013, at 56, 57. For a discussion of the difference between an accounting loss and a cash loss, see José Gabilondo, *Financial Moral Panic! Sarbanes-Oxley, Financier Folk Devils, and Off-Balance-Sheet Arrangements*, 36 SETON HALL L. REV. 781, 823-25 (2006).

10. Nat'l Basketball Ass'n & Nat'l Basketball Players Ass'n, NBPA Collective Bargaining Agreement (July 29, 2005) [hereinafter 2005 Agreement], available at <http://www.nbpa.com/cba/2005>.

11. Andrew Brandt, *What Owners, Players Want in New CBA*, ESPN (June 29, 2011), <http://sports.espn.go.com/nba/news/story?page=labor-110629>.

12. See *infra* Part II.

13. *NBA Lockout Timeline*, NBA, <http://www.nba.com/2011/news/09/09/labor-timeline/> (last updated Dec. 9, 2011).

14. *Id.*

15. See *infra* Part II.

bargaining ability in an era of declining membership and influence for private-sector unions.<sup>16</sup> Moreover, the National Football League (NFL) was in a similar situation that same summer, but a more player-friendly collective bargaining agreement emerged from its lockout.<sup>17</sup> The NFL players' relative success was especially puzzling considering that the NBA was generally viewed as the league where players held more power than the owners.<sup>18</sup> So why did the NBA players wind up negotiating such a bad deal for themselves?

Amid much speculation, two explanations for the debacle have become dominant. One emphasizes the financial strain on players that led to greater willingness to drop their demands and end the lockout.<sup>19</sup> The second suggests that emotions, rather than economics, propelled players to make financially irrational decisions during negotiations.<sup>20</sup> In particular, the racial overtones of the negotiating dynamic appeared to influence players' actions.<sup>21</sup> Undoubtedly, both of these explanations help clarify the problems that plagued the players' bargaining position. But they fail to offer a full account of the breakdown that occurred on the players' side, especially as it relates to the effectiveness of the players' union that spearheaded the negotiations for the 2011 Agreement.

This article explores the structural issues within the NBPA that undermined the negotiations and resulted in the players' concession to essentially all of the owners' demands. Recent scholarship in the fields of

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16. See César F. Rosado Marzán, Book Note, *Success Through Political Action: Collective Bargaining in the Private Sector*, 5 U. PA. J. LAB. & EMP. L. 655, 660 (2003) (reviewing *SUCCESS THROUGH POLITICAL ACTION: COLLECTIVE BARGAINING IN THE PRIVATE SECTOR* (Paul F. Clark et al. eds., 2003)). For example, the average baseball player salary in 2003 was \$2.37 million compared with \$3.21 million in 2012, with minimum salaries increasing from \$300,000 to \$480,000 over that same time period—a staggering 60% jump. *Average Salary Hits Record \$3.2 Million*, ESPN.COM (Dec. 7, 2012), [http://espn.go.com/mlb/story/\\_/id/8724285/mlb-average-salary-38-percent-32-million](http://espn.go.com/mlb/story/_/id/8724285/mlb-average-salary-38-percent-32-million). For more information on the decline of private-sector union membership, see News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, *Union Members 2013*, at 1 (Jan. 24, 2014), available at <http://www.bls.gov/news.release/pdf/union2.pdf> (identifying the union membership rate—that is, the percentage of wage and salary workers who were members of unions—as 11.3% in 2012, down from 20.1% in 1983).

17. See Patrick Rishe, *Who Won the 2011 NFL Lockout?*, FORBES (July 21, 2011), <http://www.forbes.com/sites/sportsmoney/2011/07/21/who-won-the-2011-nfl-lockout/>.

18. See Kevin Carpenter, *NFL and NBA Lockouts: A U.K. Lawyer's Legal Retrospective*, 20 SPORTS LAW. J. 1, 5-6 (2013).

19. See *infra* Part III.A.

20. See *infra* Part III.C.

21. *Id.*

industrial relations and communications, in addition to labor law, provides a robust framework for analyzing the shortcomings of the NBPA that led to the 2011 Agreement.<sup>22</sup> Specifically, understanding the importance of union democracy, public relations campaigns, and intra-union communications, to successful collective bargaining reveals both where the NBPA went wrong and how other professional players' unions can negotiate with greater success in the future.

To begin this analysis, Part II details some of the major terms of the 2011 Agreement and compares them to the terms of the 2005 Agreement. This Part highlights the nature and extent of the losses that the players incurred as a result of poor collective bargaining. Part III analyzes the two dominant explanations for the 2011 Agreement, fleshing out the financial and emotional concerns that helped drive many of the players' missteps in the collective bargaining process. While these explanations have merit, they tend to emphasize individual players' motivations over the decisions and actions of the union.<sup>23</sup> Given that the players' union was leading the negotiations for most of the process, such explanations can only partially account for the outcome.

Therefore, Part IV offers alternative, complementary theories for why the players largely failed in their collective bargaining negotiations. This Part takes an interdisciplinary approach by looking to communications and industrial relations scholarship that have yet to be fully mined in the legal literature on labor disputes and collective bargaining. This scholarship reveals how the NBPA's deficiencies in union democracy, intra-union communications, and public relations undermined its bargaining position and doomed its efforts at the negotiating table.

The goal of this article is to provide a new and useful framework for analyzing the collective bargaining process, particularly for players' unions, but for other private-sector unions as well. In that sense, it simultaneously offers guidance for future negotiations by players' unions and other private-sector unions. Therefore, Part V offers concluding remarks regarding the implications of this framework.

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22. *See infra* Part IV.

23. An exception to the individualized focus of these explanations is the racial dynamics between team owners, who are overwhelmingly white, and the players, who are predominantly African American. This, as I discuss in Part III below, involves a power struggle that also has a much longer history beyond this particular instance of labor unrest.

## II. The 2011 Agreement

Even before the lockout, the NBA owners claimed that the terms of the 2005 Agreement needed major changes due to the financial losses they were sustaining each year.<sup>24</sup> Specifically, the owners asserted that twenty-two of the NBA's thirty teams collectively lost more than \$300 million in each of the previous three seasons.<sup>25</sup> To address their claimed losses, the owners wanted four significant concessions from the players under the 2011 Agreement: (1) a greater share of basketball-related income (BRI),<sup>26</sup> (2) an adjustment in player contract length and amount, (3) more limited exceptions to the salary cap, and (4) changes in revenue sharing.<sup>27</sup> The players eventually crumbled on all four fronts. These concessions constituted the main changes in the 2011 Agreement compared to the 2005 Agreement.<sup>28</sup>

In terms of the BRI, the owners wanted to change the existing allocations, which were 57% for the players and 43% to the owners under the 2005 Agreement.<sup>29</sup> Citing their annual losses, the owners demanded that the percentages be reversed in their favor, or at least split evenly.<sup>30</sup> The NBPA sought to maintain the existing BRI allocations.<sup>31</sup> Ultimately, in what was perhaps the most significant change to the 2011 Agreement, the BRI division went from 57-43 in favor of the players to essentially a 50-50 split.<sup>32</sup> The players thus relinquished approximately 12% of their collective

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24. Gabriel Feldman, *Brady v. NFL and Anthony v. NBA: The Shifting Dynamics in Labor-Management Relations in Professional Sports*, 86 TUL. L. REV. 831, 844-45 (2012).

25. *Id.* at 845.

26. BRI is the aggregate operating revenue of the NBA or its member teams during a particular season—for example, money from television contracts, ticket sales, merchandise, and the like. See 2005 Agreement, *supra* note 10, art. VII, § 1(a).

27. Grow, *supra* note 3, at 494.

28. Compare 2011 Agreement, *supra* note 2, with 2005 Agreement, *supra* note 10; see also *NBA Lockout Timeline*, *supra* note 13.

29. Kemper C. Powell, Note, *Beyond Brady and Anthony: The Contemporary Role of Antitrust Law in the Collective Bargaining Process*, 14 TEX. REV. ENT. & SPORTS L. 147, 161 (2013).

30. Grow, *supra* note 3, at 494 n.140 (noting that the owners were interested in a BRI split of 57% for the owners and 43% for the players).

31. Taubin, *supra* note 7, at 146.

32. See Larry Coon, *Breaking Down Changes in New CBA*, ESPN (Nov. 28, 2011), [http://espn.go.com/nba/story/\\_/page/CBA-111128/how-new-nba-deal-compares-last-one](http://espn.go.com/nba/story/_/page/CBA-111128/how-new-nba-deal-compares-last-one). The players' share of BRI may fluctuate a bit from between 49% and 51% depending on whether the BRI for a given year exceeds or falls short of expectations. *Id.*

salaries in the 2011 Agreement.<sup>33</sup> In terms of overall dollars, this change amounted to an annual revenue shift of somewhere between \$225 and \$300 million from the players to the owners.<sup>34</sup> As these figures demonstrate, the players conceded a substantial amount of money to the owners in the 2011 Agreement.

The NBA owners also demanded dramatic changes to the lengths and amounts of player contracts. The owners ideally sought nonguaranteed player contracts, renewable on an annual basis.<sup>35</sup> More realistically, they wanted to reduce the maximum length of player contracts, the maximum salaries that players could earn, and the amount of annual raises permitted in player contracts.<sup>36</sup> The NBPA wanted minimal, if any, changes to the existing permissible contract terms, which were quite favorable to players.<sup>37</sup> The owners prevailed on this point, as the 2011 Agreement notably reduced the length and amount of new contracts and contract extensions for players. For those teams signing free agents that were eligible for the “Larry Bird exception” to the salary cap,<sup>38</sup> the 2005 Agreement had permitted teams to sign these players to six-year contracts with 10% raises each year.<sup>39</sup> Under the 2011 Agreement, however, teams can only sign their Larry Bird free agents to five-year contracts with 7.5% annual raises.<sup>40</sup> For contract extensions, the 2005 Agreement allowed teams to sign their players to contract extensions for up to five years.<sup>41</sup> The 2011 Agreement, on the

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33. Alexander C. Krueger-Wyman, Note, *Collective Bargaining and the Best Interests of Basketball*, 12 VA. SPORTS & ENT. L.J. 171, 188 (2012).

34. See Taubin, *supra* note 7, at 146.

35. Grow, *supra* note 3, at 494.

36. Sedeh, *supra* note 9, at 58; see also Grow, *supra* note 3, at 494.

37. Cf. Carpenter, *supra* note 18, at 5 (stating that NBA players were much better off under the 2005 CBA than were NFL players under their most recent CBA).

38. As a general matter, the Larry Bird exception allows teams to exceed the salary cap to sign their own free agents. Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459, 1488 n.157 (2006) (explaining the origins of the Larry Bird exception); see also Larry Coon, *Larry Coon's NBA Salary Cap FAQ*, CBAFAQ.COM (Jan. 15, 2014), <http://www.cbafaq.com/salarycap.htm#Q32> (detailing the various provisions related to the Larry Bird exception in the 2011 Agreement).

39. Coon, *supra* note 32. The maximum salary amount could be no more than 25%, 30%, or 35% of the salary cap, depending on the number of years of service that the player had at the time. *Id.*

40. *Id.* There are similar maximum salary limitations for these player contracts as with the 2005 Agreement. See *id.*

41. *Id.* This provision applied to veteran players or those players finishing their rookie contracts. See *id.*



other hand, limits teams to four-year contract extensions for their players.<sup>42</sup> As these provisions demonstrate, the players gave up some financial security and earning power by agreeing to shorter contracts and smaller annual raises in the 2011 Agreement. These were not insignificant concessions, especially given that the average NBA player's career lasts only four and a half years.<sup>43</sup>

On a related matter, the owners sought to limit their payroll costs by tightening up the "soft" salary cap from the 2005 Agreement, which provided for a number of generous exceptions that permitted teams to exceed the maximum salary cap.<sup>44</sup> The owners publicly yearned for a "hard" salary cap, where a team's total player salary could not exceed the salary cap for any reason.<sup>45</sup> But in reality, the owners wanted more limited exceptions to the soft salary cap in the 2011 Agreement.<sup>46</sup> Given that a hard salary cap would reduce player salaries, the NBPA naturally opposed a hard salary cap. Instead, the union wanted to maintain the existing "soft" salary cap, with only minor modifications.<sup>47</sup>

Ultimately, the 2011 Agreement preserved the soft salary cap, but it contained several provisions that limited—either de facto or de jure—a team's ability to spend aggressively in excess of that cap. The 2011 Agreement's treatment of the mid-level exception provides a good example. The mid-level exception allows a team with a player payroll in excess of the salary cap to sign a player for an amount equal to the average NBA player salary.<sup>48</sup> The 2005 Agreement permitted teams to offer mid-level exception contracts for up to five years, starting at \$5.765 million in the

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42. *Id.* There is one exception: a team can designate one player on its roster for a five-year extension if that player is finishing his rookie contract. *Id.*

43. Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 768 (2010).

44. Chris Deubert et al., *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA ENT. L. REV. 1, 72 n.502 (2012).

45. Carpenter, *supra* note 18, at 5; *see also* Benjamin A. Tulis, *Final-Offer "Baseball" Arbitration: Contexts, Mechanics & Applications*, 20 SETON HALL J. SPORTS & ENT. L. 85, 94 n.33 (2010) (defining a hard salary cap).

46. *See NBA Lockout Timeline*, *supra* note 13 (noting that on October 1, 2011, the owners and players met to negotiate regarding the salary cap and that the owners wanted changes to the existing soft salary cap).

47. Brandt, *supra* note 11.

48. *See* James L. Perzik, *Mysteries of the NBA "Salary Cap" and the "Escrow and Tax" System*, in 1 ALI-ABA COURSE OF STUDY: ENTERTAINMENT, ARTS, AND SPORTS LAW 149, 155 (2007), available at SM009 ALI-ABA 149 (Westlaw).

2010-11 season, with 8% raises each year.<sup>49</sup> The 2011 Agreement, on the other hand, limits teams that are not paying the luxury tax<sup>50</sup> in a given year to offering four-year, mid-level exception contracts, starting at \$5 million for the 2012-13 season, with 4.5% raises each year.<sup>51</sup> For those teams paying the luxury tax in a given season, the 2011 Agreement further limits those teams to three-year, mid-level exception contracts, starting at \$3 million for the 2012-13 season, with 3% raises.<sup>52</sup> The 2011 Agreement thus reduced the length and amount of mid-level exception contracts; such contracts are one of the primary avenues for teams to exceed the salary cap to increase spending on player salaries.

Unlike the other three key negotiation points, revenue sharing<sup>53</sup> was less publicly contentious but still incredibly important to both sides. Players saw revenue sharing as a key subject for collective bargaining, even though it had not been collectively bargained previously.<sup>54</sup> They wanted to collectively bargain with the owners on revenue sharing because they saw it as an opportunity to force smaller-market NBA teams to spend more money on player salaries.<sup>55</sup> Conversely, the NBA owners—while not unanimous in their views on the topic—saw revenue sharing as a way to avoid

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49. Coon, *supra* note 32.

50. The luxury tax is a penalty or tax imposed on teams whose aggregate player salaries for a season exceed a specified amount. Richard A. Kaplan, Note, *The NBA Luxury Tax Model: A Misguided Regulatory Regime*, 104 COLUM. L. REV. 1615, 1617 (2004). The luxury tax seeks to dissuade teams from having extremely high payrolls and spending significantly more than their counterparts. See Robert Holo & Jonathan Talansky, *Taxing the Business of Sports*, 9 FLA. TAX. REV. 161, 203 n.158 (2008). The monies collected from the luxury tax are used as part of the league's revenue sharing plan. See Frank J. Marallo, Jr., Note, *Permeating the Good Old Boys Club: Why Holding the Commissioner of Baseball to a Fiduciary Duty of Loyalty Is in the "Best Interests" of the Game*, 7 BROOK. J. CORP. FIN. & COM. L. 475, 493 n.134 (2013).

51. Coon, *supra* note 32.

52. *Id.*

53. Revenue sharing is the process of sharing some league and team revenue to maintain competitive balance among teams. John Lombardo, *Inside NBA's Revenue Sharing*, SPORTS BUS. J. (Jan. 23, 2012), <http://www.sportsbusinessdaily.com/Journal/Issues/2012/01/23/Leagues-and-Governing-Bodies/NBA-revenue.aspx>.

54. See Michael J. Fensom, *NBA Owners, Players Call For Expanded Revenue Sharing in New Collective Bargaining Agreement*, NJ.COM (June 27, 2011), [http://www.nj.com/nets/index.ssf/2011/06/nba\\_owners\\_players\\_call\\_for\\_ex.html](http://www.nj.com/nets/index.ssf/2011/06/nba_owners_players_call_for_ex.html); Derek Thompson, *The NBA Lockout: Here's What You Need to Know*, ATLANTIC (June 30, 2011), <http://www.theatlantic.com/business/archive/2011/06/the-nba-lockout-heres-what-you-need-to-know/241251/>.

55. Thompson, *supra* note 54.

perpetual financial losses by certain teams and thus maintain or achieve competitive balance.<sup>56</sup>

The 2011 Agreement brought about significant changes in the league's revenue sharing among teams. At first glance, these changes appear to be friendlier to the players. Teams not paying the luxury tax (presumably smaller-market teams) will receive more money from those teams that are paying the luxury tax (presumably the bigger-market teams) and thus can spend more on player salaries.<sup>57</sup> The new luxury tax system is estimated to nearly triple the amount of money that is shared or redistributed;<sup>58</sup> indeed, once the new luxury tax system is implemented in this 2013-14 season, it is anticipated that there will be an additional \$140 million in revenue sharing compared to previous seasons.<sup>59</sup> In theory, if the smaller-market teams have more money to spend on player salaries through such a robust revenue-sharing system, then the players on those teams should receive better salaries.

However, certain components of the new luxury tax system suggest that the terms are not as favorable to players as they may appear.<sup>60</sup> Specifically, the increase in luxury tax—aimed at redistributing league revenue by taxing teams with higher payrolls—may wind up creating significant financial disincentives for teams that choose not to exceed the luxury tax threshold.<sup>61</sup> If enough teams seek to avoid paying the new luxury tax, there will be less money to distribute through revenue sharing than was originally estimated.

The comparison in luxury taxes between the 2005 Agreement and the 2011 Agreement is instructive. Under the 2005 Agreement, teams whose payroll exceeded the luxury tax threshold—an amount equivalent to 61% of

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56. See Henry Abbott, *Sticking Point: Competitive Balance*, ESPN.COM (Sept. 30, 2011), [http://espn.go.com/blog/truehoop/post/\\_id/32164/sticking-point-competitive-balance](http://espn.go.com/blog/truehoop/post/_id/32164/sticking-point-competitive-balance).

57. See Coon, *supra* note 32.

58. Taubin, *supra* note 7, at 147.

59. See Lombardo, *supra* note 53.

60. For example, teams paying the luxury tax are more limited in their ability to offer mid-level exception contracts, in terms of length (three years versus four), starting salary (\$3 million instead of \$5 million), and per-year salary increases (3% versus 4.5%). See Coon, *supra* note 32. Moreover, luxury taxpaying teams cannot acquire as much salary through a trade as non-taxpaying teams, do not have the biannual exception contract to offer free agents (as non-taxpaying teams do), and cannot receive a player through a sign-and-trade agreement. *Id.*

61. See Brett Pollakoff, *Stricter Luxury Tax Penalties in New CBA Could Actually Help Big Market Teams*, NBCSPORTS (Aug. 18, 2013), <http://probasketballtalk.nbcsports.com/2013/08/18/stricter-luxury-tax-penalties-in-new-cba-could-actually-help-big-market-teams/> (explaining why few, if any teams, will wind up paying the luxury tax).

the BRI—were taxed at a dollar-for-dollar amount.<sup>62</sup> For the first two years of the 2011 Agreement, this same dollar-for-dollar luxury tax remained.<sup>63</sup> After these first two seasons—the second of which recently concluded—the luxury tax rates increase dramatically for future seasons. Beginning in 2013-14, teams with player payrolls in excess of the luxury tax threshold will pay an incremental luxury tax rate based on their team salaries.<sup>64</sup> For the first \$5 million that a team surpasses the luxury tax threshold, it will pay \$1.50 for each dollar over that threshold.<sup>65</sup> For each additional \$5 million increment that a team's player salaries exceed the luxury tax threshold, the team must pay a per-dollar tax of \$1.75 (for \$5 million to \$9,999,999), \$2.50 (for \$10 million to \$14,999,999), \$3.25 (for \$15 million to \$19,999,999), and \$3.75 (for \$20 million to \$24,999,999).<sup>66</sup>

Beginning in the 2014-15 season, the luxury tax system imposes an even more draconian per-dollar tax for those teams that repeatedly exceed the luxury tax threshold.<sup>67</sup> A repeat offender will be a team that paid the luxury tax for the previous three seasons (counting backward from the 2014-15 season) or three of the previous four seasons (from the 2015-16 season and thereafter).<sup>68</sup> For those repeat offender teams, the per-dollar luxury tax amount for that season is increased by one dollar per increment level: \$2.50 (for the first \$12.5 million over the luxury tax threshold), \$2.75 (for an amount between \$12.5 million and \$13.75 million), \$3.50 (for an amount between \$13.75 million and \$17.5 million), and \$4.25 (for an amount between \$17.5 million and \$21.25 million).<sup>69</sup>

While the NBPA may have anticipated robust luxury tax revenue to distribute from the taxpaying, big-market teams to the non-taxpaying, smaller-market teams, the initial results have suggested otherwise. NBA

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62. Zachary Golden, Note, *Is This Heaven? No, It's I.O.U.: Why Major League Baseball Must Modify Its Current Revenue-Sharing and Luxury-Tax Procedures*, 45 SUFFOLK U. L. REV. 125, 141 n.129 (2011).

63. Taubin, *supra* note 7, at 147. The luxury tax threshold for the 2011 Agreement is now 53.51% of BRI. See Coon, *supra* note 38.

64. Krueger-Wyman, *supra* note 33, at 186-87.

65. Coon, *supra* note 38.

66. *Id.* For each \$5 million increment beginning at \$25 million, the per-dollar luxury tax amount is increased by fifty cents. *Id.* This luxury tax scale continues to apply to teams that are not repeat luxury tax offenders in the previous three years for the 2014-15 season or, as of the 2015-16 season or thereafter, in three of the last four years. *Id.*

67. See Krueger-Wyman, *supra* note 33, at 187.

68. Coon, *supra* note 38.

69. *Id.* For each \$5 million increment beginning at \$21.25 million, the per-dollar luxury tax amount is increased by fifty cents. *Id.*

teams have attempted to avoid the luxury tax, paring down their payrolls through various approaches. For example, twenty of the thirty teams have used the one-time amnesty clause to cut a player to provide some luxury tax relief.<sup>70</sup> The amnesty clause provides teams with a one-time opportunity to release one player whose current contract predated the 2011 Agreement, and thus take his salary out of salary cap and luxury tax calculations.<sup>71</sup> The rather aggressive use of the amnesty clause by teams in the last two years demonstrates an acute interest in avoiding the luxury tax, even before the more draconian luxury tax provisions kick in.<sup>72</sup>

Moreover, sensitivity to the luxury tax appears to have had a chilling effect on the recent free-agency market in the summer of 2013. For example, Milwaukee Bucks guard Monta Ellis opted out of the final year of his contract—valued at \$11 million for the season—and turned down an additional two-year extension of \$25 million thinking that he could get a comparable or better contract through free agency.<sup>73</sup> Instead, Ellis signed a three-year contract with the Dallas Mavericks that will earn him a total of between \$25 and \$30 million.<sup>74</sup> While this is still a lucrative contract, the amount is between \$6 and \$11 million less than the contract with the Milwaukee Bucks that he declined. Ellis's contract and others like it may signal that teams are adjusting their free agency spending, and overall payroll spending, to avoid paying the luxury tax. If true, this trend will lead to a drop in players' value. In this regard, the revenue-sharing envisioned by the players (and perhaps even the teams) may not come to fruition in the manner they expected.

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70. Jeff Caplan, 'Amnesty That!' An Amnesty Find Is Rare, NBA (July 17, 2013), <http://hangtime.blogs.nba.com/2013/07/17/amnesty-that-an-amnesty-find-is-rare/>.

71. Coon, *supra* note 38. The team must still pay the player the amount of the salary less any amount paid by a team that signs that player to a new contract during the remaining term of the "amnestied" contract. *Id.*

72. See, e.g., Mike Bresnahan, *Lakers Waive Forward Metta World Peace Under Amnesty Provision*, L.A. TIMES, July 11, 2013, <http://www.latimes.com/sports/lakersnow/lasp-in-lakers-waive-metta-world-peace-20130711,0,510395.story> (noting that the Los Angeles Lakers, a team that has consistently paid the 2005 Agreement's luxury tax year-after-year, used the amnesty clause to waive Metta World Peace to save approximately fifteen million in luxury taxes). Moreover, of the ten remaining teams that have yet to exercise their rights under the amnesty clause, three of them do not have any contracts that are eligible to be amnestied. Caplan, *supra* note 70.

73. Charles F. Gardner, *Report: Ellis Agrees to Deal with Mavericks*, JSOnline (July 12, 2013), <http://www.jsonline.com/blogs/sports/215280211.html>.

74. Matt Moore, *Monta Ellis Agrees to Three-Year Deal with Dallas Mavericks*, CBSSports (July 12, 2013), <http://www.cbssports.com/nba/blog/eye-on-basketball/22734318/monta-ellis-agrees-to-three-year-deal-with-dallas-mavericks>.

To be sure, the 2011 Agreement was not a complete disaster for the players; there were terms that the players could point to as being beneficial to their interests. For example, under the 2011 Agreement, teams must spend a minimum of 85% to 90% of the salary cap as a minimum payroll versus merely 75% of the salary cap under the 2005 Agreement.<sup>75</sup> However, when one considers the four major deal points, the players made key concessions, the magnitude of which can be aptly described as ranging from significant (for the salary cap modifications), to substantial (for the changes in contract terms), to massive (for the reduction in BRI for the players).

### *III. The Traditional Explanations*

Commentators posit various theories as to why the NBPA wound up with a relatively undesirable deal in the 2011 Agreement. These include the financial strain that the lockout inflicted on players, the overestimation of the impact of NBA players playing overseas, and the players' emotional reactions to the collective bargaining negotiations, coupled with the impact racial overtones had on the process. While each of these explanations holds some truth, they—whether individually or collectively—do not fully explain the unfavorable results of the NBPA's efforts.

#### *A. Financial Strain on Players*

As with most labor lockouts—whether in the setting of professional sports or in less high-profile industries—financial considerations and circumstances played a key role in negotiations. To be sure, the NBPA attempted to minimize the financial impact on its members. More than two years before the lockout occurred, the NBPA anticipated that the NBA owners would lock the players out in the summer of 2011.<sup>76</sup> Accordingly, in a fifty-six-page instructional “Lockout Handbook,” the NBPA warned its players well in advance of the lockout to make financial arrangements to sustain themselves through an extended lockout that would almost certainly entail some cancelled games and potentially a cancelled season (with the

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75. Krueger-Wyman, *supra* note 33, at 189.

76. Kurt Helin, *Union Head Billy Hunter Says Little Progress Made in Talks*, NBCSPORTS (Sept. 23, 2011), <http://probasketballtalk.nbcsports.com/2011/09/23/union-head-billy-hunter-says-little-progress-made-in-talks/>; *see also* Kurt Helin, *Player Reaction to Preseason Postponement: Saw That Coming*, NBCSPORTS (Sept. 22, 2011), <http://probasketballtalk.nbcsports.com/2011/09/22/player-reaction-to-preseason-postponement-saw-that-coming> [hereinafter Helin *Player Reaction*] (quoting Jared Dudley as saying, “[The NBA] want[s] us to miss checks. They want us to feel the burn. We knew this.”).

attendant loss in income for the players).<sup>77</sup> Players claimed that they were prepared for the lockout and were ready to weather the financial loss until a fair deal was struck between the players and owners.<sup>78</sup> This position was relatively easy to take early in the lockout because players were not due to receive their first paychecks for the 2011-12 season until November 15, 2011.<sup>79</sup> Moreover, in September 2011, the players were set to receive 8% of their salary from the 2010-11 season as part of the NBA's escrow system.<sup>80</sup> The players thus appeared to be financially equipped for the lockout.

However, it turned out that the players had not adequately insulated themselves from financial pressure. Perhaps this should not come as a surprise, as much has been written on the precarious nature of professional athletes' financial well-being.<sup>81</sup> For example, during this same period of time—and in the midst of the NFL lockout—it was reported that more than 20% of NFL players lived paycheck-to-paycheck.<sup>82</sup> NBA players were not immune to this pervasive trend in professional sports: many players were still living paycheck-to-paycheck, despite all of the NBPA warnings over

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77. Mason Levinson, *NBA Union Urges Players to 'Prepare for Worst' in Lockout Instruction Book*, BLOOMBERG (Mar. 11, 2011), <http://www.bloomberg.com/news/2011-03-11/nba-union-urges-players-to-prepare-for-worst-in-lockout-instruction-book.html>.

78. See Helin, *Player Reaction*, *supra* note 76.

79. Kurt Helin, *So How Does This Lockout Get Resolved?*, NBCSPORTS (July 1, 2011), <http://probasketballtalk.nbcsports.com/2011/07/01/so-how-does-this-lockout-get-resolved>.

80. See Kurt Helin, *About the Players Not Getting Paychecks . . . They Are About To*, NBCSPORTS (Sept. 8, 2011) <http://probasketballtalk.nbcsports.com/2011/09/08/about-the-players-not-getting-paychecks%E2%80%A6they-are-about-to/>. Under the escrow system, the league withholds a portion of each player's salary in a given season to ensure that the players do not receive a greater percentage of BRI for that season than that to which they are entitled under the collective bargaining agreement. *Id.* These monies, which are put into escrow, are then paid to the players after the conclusion of the season and fiscal year so that the BRI can be calculated and the appropriate amount of withheld money returned to the players. *Id.*

81. See, e.g., Pablo S. Torre, *How (and Why) Athletes Go Broke*, SI (Mar. 23, 2009), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1153364> (noting, among other things, that within two years of retirement, 78% of former NFL players go bankrupt or experience severe financial hardship and that 60% of former NBA players are broke within five years of retirement).

82. Bill Briggs, *NFL Owners Won't Run Hurry-Up Offense vs. Players*, MSNBC (Mar. 2, 2011), [http://www.nbcnews.com/id/41855264/ns/business-personal\\_finance/#.Uf6c7RbvzoA](http://www.nbcnews.com/id/41855264/ns/business-personal_finance/#.Uf6c7RbvzoA).

the preceding several years.<sup>83</sup> The financial vulnerability of these players provided leverage for the owners in the collective bargaining negotiations.

As the lockout progressed, the NBA began to cancel preseason<sup>84</sup> and then regular-season games.<sup>85</sup> Understandably, those players living paycheck-to-paycheck began to bristle as they lost salary from these cancelled games.<sup>86</sup> These short-term salary losses were significant given that the average NBA player's career is a mere four-and-a-half years.<sup>87</sup> Indeed, players who were reaching the end of their careers, players who had been injured, and middle-of-the-road players whose lucrative contracts were about to expire all acutely felt the impact of cancelled games and the potential cancellation of the entire season.<sup>88</sup> Some NBA players, like Kobe Bryant, were sufficiently concerned about the financial state of other players—and thus the union's ability to keep a unified player position—that they offered to lend other players money if the lockout lasted an extended

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83. Adrian Wojnarowski, *NBA Stars Face Roadblock to Play in China*, YAHOO (Aug. 15, 2011), [http://sports.yahoo.com/nba/news?slug=aw-wojnarowski\\_nba\\_players\\_china\\_081511](http://sports.yahoo.com/nba/news?slug=aw-wojnarowski_nba_players_china_081511).

84. Howard Beck, *The N.B.A. Cancels 43 Preseason Games*, N.Y. TIMES, Sept. 24, 2011, at D6.

85. Trevor E. Brice, *Labor Pains on the Playing Field: Why Taking a Page from Europe's Playbook Could Help the United States*, 20 UCLA ENT. L. REV. 49, 60 (2013). There was also the more macro-level concern that the longer the lockout lasted, the more likely that some significant portion of the NBA's fan base might become alienated—resulting in a decrease in the league's overall revenue and thus the players' amount of BRI. See Kurt Helin, *With NBA Lockout There Are Plenty of Losers, but It Starts with Fans*, NBCSPORTS (July 1, 2011), <http://probasketballtalk.nbcsports.com/2011/07/01/with-nba-lockout-there-are-plenty-of-losers-but-it-starts-with-fans/>; see also Kurt Helin, *NBA Owners Take Big Risk Playing Fans for Fools*, NBCSPORTS (Oct. 11, 2011), <http://probasketballtalk.nbcsports.com/2011/10/11/nba-owners-take-big-risk-playing-fans-for-fools> (noting that casual fans, angered by the lockout, might simply turn their attention and entertainment spending to other venues).

86. See Kurt Helin, *Add Samardo Samuels to List of Guys Frustrated with Union*, NBCSPORTS (Nov. 15, 2011), <http://probasketballtalk.nbcsports.com/2011/11/15/add-samar-do-samuels-to-list-of-guys-frustrated-with-union/>.

87. Ira Winderman, *Winderman: Average NBA Player Can't Miss Full Season*, NBCSPORTS (Sept. 13, 2011), <http://probasketballtalk.nbcsports.com/2011/09/13/winderman-average-nba-player-can%E2%80%99t-miss-full-season>.

88. Kurt Helin, *Which Players Have the Most to Lose with a Long Lockout?*, NBCSPORTS (Oct. 21, 2011), <http://probasketballtalk.nbcsports.com/2011/10/21/which-players-have-the-most-to-lose-with-a-long-lockout/> (citing examples, such as Mehmet Okur, James Posey, and Charlie Bell, who faced significant challenges because of their inability to play cancelled games (or the entire season) due to the lockout).



period of time.<sup>89</sup> Other players sought employment elsewhere to help sustain them during the lockout. For example, after complaining about the lack of health insurance for himself and his family, Delonte West applied for a job at Home Depot before eventually taking a job stocking merchandize at a furniture store.<sup>90</sup> Luke Walton took a position as an assistant coach for the University of Memphis's men's basketball team, with the understanding that he could leave the position and return to the NBA when the lockout ended.<sup>91</sup>

Elite players, on the other hand, did not experience the same kind of financial pressures as many of their fellow union members. This may have been due, in part, to the fact that many of them had earned more than \$100 million during their playing careers and thus were financially stable.<sup>92</sup> Significantly, the NBA's elite players also had more lucrative opportunities during the lockout than most players. For example, Kobe Bryant, Kevin Durant, and Derrick Rose reportedly earned more than \$400,000—tax-free—to play in a few exhibition games against local teams in the Philippines.<sup>93</sup> Chris Paul, Dwayne Wade, and Carmelo Anthony earned a significant amount of money from their promotional Jordan Brand Flight Tour of China.<sup>94</sup> As will be analyzed below, the dramatic difference in position between the NBA's elite players and all other players may have

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89. Kurt Helin, *Kobe Bryant Willing to Loan Players Money if Lockout Lingers*, NBCSPORTS (Sept. 19, 2011), <http://probasketballtalk.nbcsports.com/2011/09/19/kobe-bryant-willing-to-loan-players-money-if-lockout-lingers>.

90. Kurt Helin, *Delonte West Says He Has a Job in a Furniture Store*, NBCSPORTS (Sept. 29, 2011), <http://probasketballtalk.nbcsports.com/2011/09/29/delonte-west-says-he-has-a-job-in-a-furniture-store>; Kurt Helin, *Did Delonte West Apply for a Job at Home Depot?*, NBCSPORTS (Aug. 19, 2011), <http://probasketballtalk.nbcsports.com/2011/08/19/did-delonte-west-apply-for-a-job-at-home-depot>.

91. See Brett Pollakoff, *Luke Walton Hired as Assistant Coach for the University of Memphis*, NBCSPORTS (Aug. 22, 2011), <http://probasketballtalk.nbcsports.com/2011/08/22/luke-walton-hired-as-assistant-coach-for-the-university-of-memphis>.

92. See Jonathan Abrams, *The National Basketball Association's European Vacation*, GRANTLAND.COM (Aug. 1, 2011), [http://www.grantland.com/story/\\_/id/6784931/the-national-basketball-association-european-vacation](http://www.grantland.com/story/_/id/6784931/the-national-basketball-association-european-vacation).

93. Kurt Helin, *Kobe, Durant Rose Well Paid for Philippines Pickup Game*, NBCSPORTS (July 25, 2011), <http://probasketballtalk.nbcsports.com/2011/07/25/kobe-durant-rose-well-paid-for-philippines-pickup-game/>.

94. Ken Berger, *Why Have NBA's Biggest Stars Gone Quiet at Crucial Time?*, CBSSPORTS.COM (July 26, 2011), <http://www.cbssports.com/nba/story/15356359/why-have-nbas-biggest-stars-gone-quiet-at-crucial-time>; Ira Winderman, *Winderman: Challenge in NBA Lockout Is Owners, Players Infighting*, NBCSPORTS (July 26, 2011), <http://probasketballtalk.nbcsports.com/2011/07/26/winderman-challenge-in-nba-lockout-is-owners-players-infighting>.

been at the root of the internal union problems that weakened their collective bargaining efforts and results.

*B. The Trojan Horse: Overseas Playing Opportunities*

Some NBA players pursued opportunities to play basketball abroad.<sup>95</sup> The NBPA hoped to use players' international marketability as leverage with the owners and thus encouraged players to sign with foreign teams.<sup>96</sup> In fact, NBPA Executive Director Billy Hunter praised Deron Williams for his one-season contract with Turkey's Besiktas Cola Turka, claiming that the deal demonstrated that players would "not be intimidated by the league's hard-line tactics."<sup>97</sup> However, it quickly became public knowledge that the union was advising players to negotiate an opt-out clause in their contracts so that they could return to play in the NBA when the lockout ended.<sup>98</sup> In this regard, it is unlikely that the NBA owners felt threatened by these foreign contracts.

In fact, there were several reasons why such contracts would not have concerned NBA owners and, perhaps more importantly, why players might have chosen not to enter into such contracts. NBA players faced the risk that if they sustained a serious injury playing overseas, their NBA contracts, which would otherwise remain valid, could be voided.<sup>99</sup> For more marginal players with modest contracts, playing abroad may have held some appeal; however, for other players with more lucrative contracts, such risks outweighed the financial benefits, even if they could get their contracts insured.<sup>100</sup> This latter point became an issue for many NBA players, as foreign teams simply could not afford to insure NBA player contracts in

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95. Abrams, *supra* note 80.

96. Kurt Helin, *Union Letter to NBA Players: Keep Looking Overseas*, NBCSPORTS (July 13, 2011), <http://probasketballtalk.nbcsports.com/2011/07/13/union-letter-to-nba-players-keep-looking-overseas/>.

97. Howard Beck, *Want to Play Abroad During the Lockout? No Problem, Says the Players Union*, N.Y. TIMES, July 13, 2011, at B18, available at <http://www.nytimes.com/2011/07/14/sports/basketball/union-leaders-give-players-support-to-play-overseas.html> (quoting Billy Hunter). Williams's contract contained an opt-out provision that allowed him to return to the NBA when the lockout concluded. *Id.*

98. *NBA Lockout: Union Memo Supports Players Going Overseas*, NJ.COM (July 13, 2011), [http://www.nj.com/nets/index.ssf/2011/07/nba\\_lockout\\_union\\_memo\\_support.html](http://www.nj.com/nets/index.ssf/2011/07/nba_lockout_union_memo_support.html).

99. Kurt Helin, *Players Union Pushing Idea 'Melo, Other Stars Might Play in Europe*, NBCSPORTS (July 8, 2011), <http://probasketballtalk.nbcsports.com/2011/07/08/players-union-pushing-idea-%E2%80%98melo-other-stars-might-play-in-europe/>.

100. Kurt Helin, *Don't Expect a Flood of Top NBA Players to Europe*, NBCSPORTS (July 7, 2011), <http://probasketballtalk.nbcsports.com/2011/07/07/don%E2%80%99t-expect-a-flood-of-top-nba-players-to-europe/> [hereinafter Helin, *Don't Expect a Flood*].

order to sign these players to overseas contracts.<sup>101</sup> This insurance issue was of such importance that the NBPA even attempted to assist foreign teams with finding month-to-month insurance policies.<sup>102</sup>

In addition, many foreign teams were not interested in signing NBA players merely for a portion of their respective seasons, as they assumed that players would exercise their opt-out clauses and return to the NBA.<sup>103</sup> In fact, the Chinese Basketball Association adopted two rules that severely restricted the ability, and/or interest, of NBA players to play in its league. First, the Chinese league only allowed teams to sign an NBA player who was a free agent, of which there were only 108.<sup>104</sup> Second, the Chinese league prevented those free-agent NBA players from negotiating opt-out clauses in their Chinese league contracts.<sup>105</sup>

Even if these various logistical hurdles did not exist, players faced relatively meager overseas salaries compared to their NBA pay. Instead of the average player salary of \$5.8 million (equaling approximately \$430,000 per month), NBA players signing contracts abroad earned, on average,

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101. Kurt Helin, *Insurance Issues Holding Up Bogut from Playing Down Under*, NBCSPORTS (Sept. 23, 2011), <http://probasketballtalk.nbcsports.com/2011/09/23/insurance-issues-holding-up-bogut-from-playing-down-under/>; see also Kurt Helin, *Artest's Great English Adventure May Be Done In by Insurance*, NBCSPORTS (Aug. 19, 2011), <http://probasketballtalk.nbcsports.com/2011/08/19/artest%E2%80%99s-great-english-adventure-may-be-done-in-by-insurance/> (explaining that Metta World Peace's proposed contract with the Cheshire Jets in Britain fell through because the team was unable to insure his \$21 million contract with the Los Angeles Lakers); Marc Stein, *Andrew Bogut Won't Play in Australia*, ESPN.COM (Oct. 6, 2011), [http://espn.go.com/nba/story/\\_id/7066742/andrew-bogut-milwaukee-bucks-deal-australian-team-agent-says](http://espn.go.com/nba/story/_id/7066742/andrew-bogut-milwaukee-bucks-deal-australian-team-agent-says) (noting that the Sydney Kings could not afford to insure Andrew Bogut's \$39 million contract with the Milwaukee Bucks in order to sign him).

102. Kurt Helin, *Union to Help Players Get Insurance if They Head Overseas*, NBCSPORTS (July 18, 2011), <http://probasketballtalk.nbcsports.com/2011/07/18/union-to-help-players-get-insurance-if-they-head-overseas/>.

103. Kurt Helin, *Europe's Best Teams Still Hesitant to Sign NBA Stars*, NBCSPORTS (Aug. 9, 2011), <http://probasketballtalk.nbcsports.com/2011/08/09/europe's-best-teams-still-hesitant-to-sign-nba-stars/>.

104. Jon Pastuszek, *CBA Bars Players with Active NBA Contracts from Playing in China*, NIUBBALL (Aug. 19, 2011), <http://www.niuball.com/2011/08/cba-bars-players-with-active-nba-contracts-from-playing-in-china/>.

105. Kurt Helin, *Chinese League Moves to Block NBA Player Influx*, NBCSPORTS (Aug. 18, 2011), <http://probasketballtalk.nbcsports.com/2011/08/18/chinese-league-moves-to-block-nba-player-influx/>.

between \$50,000 and \$75,000 per month.<sup>106</sup> Perhaps this is why the vast majority of players signing foreign contracts were “rookies, middling veterans, and fringe players.”<sup>107</sup> Even those players with more lucrative overseas contracts earned a fraction of their NBA salaries. Deron Williams’s contract—the one held out as a model by the NBPA—was worth \$200,000 per month, merely one-tenth of his NBA contract.<sup>108</sup> Kenyon Martin and J.R. Smith signed with teams in the Chinese Basketball Association for \$2.6 million and \$3 million respectively,<sup>109</sup> but those salaries were significantly less than the \$16.5 million and \$6.7 million, respectively, that each earned in the NBA during the 2010-11 season.<sup>110</sup>

Finally, several NBA players who had previously played overseas warned their fellow union members of the cultural challenges of playing abroad. For example, Josh Childress—who had spent three years playing in Greece before returning to play in the NBA—advised players against playing abroad.<sup>111</sup> In particular, Childress noted that the more physical style of overseas basketball was different than in the NBA, foreign coaches had more power and influence than NBA coaches, and the leagues had a far more demanding travel schedule than the one players experienced in the

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106. Howard Beck, *A Lot of Talk, but Few Stars Have Left the Country to Play*, N.Y. TIMES, Oct. 13, 2011, at B14, available at <http://www.nytimes.com/2011/10/13/sports/basketball/nba-lockout-few-stars-join-foreign-teams.html>.

107. *Id.* Even for the player whose salary was the \$1 million minimum veteran’s salary, playing abroad may have posed too great a risk.

108. Helin, *Don’t Expect a Flood*, *supra* note 100. Williams’s deal covered housing expenses, a driver, a security guard, and a personal assistant, but even with these perks, the contract paled in comparison to his NBA contract. *See id.*

109. Kurt Helin, *J.R. Smith’s Demands Have Chinese Team Frustrated*, NBCSPORTS (Nov. 22, 2011), <http://probasketballtalk.nbcsports.com/2011/11/22/j-r-smiths-demands-have-chinese-team-frustrated/>; Adrian Wojnarowski, *Kenyon Martin Leaving Chinese Team*, YAHOO (Dec. 21, 2011), [http://sports.yahoo.com/nba/news?slug=aw-wojnarowski\\_kenyon\\_martin\\_china\\_nba\\_122111](http://sports.yahoo.com/nba/news?slug=aw-wojnarowski_kenyon_martin_china_nba_122111).

110. Christopher Dempsey, *Kenyon Martin Simmers over Lack of Contract Extension Offer from Nuggets*, DENVER POST, Sept. 30, 2010, <http://blogs.denverpost.com/nuggets/2010/09/30/kenyon-martin-simmers-over-lack-of-contract-extension-offer-from-nuggets/1714/> (noting Martin’s \$16.5 million salary for the 2010-11 season); Marc Stein, *Sources: Mavs Chasing Prince, Smith*, ESPN (Feb. 24, 2011), [http://espn.go.com/blog/truehoop/post/\\_id/25316/sources-mavs-chasing-prince-smith](http://espn.go.com/blog/truehoop/post/_id/25316/sources-mavs-chasing-prince-smith) (noting Smith’s 2010-11 salary of \$6.7 million).

111. Kurt Helin, *Suns’ Childress Doesn’t Get NBA Players Talking Europe*, NBCSPORTS (July 13, 2011), <http://probasketballtalk.nbcsports.com/2011/07/13/suns-childress-doesn%E2%80%99t-get-nba-players-talking-europe/>.

NBA.<sup>112</sup> In addition, those players that did play overseas reported facing various difficulties related to living in a foreign country: housing, travel accommodations, food, language, communication style, and other simple activities of daily living.<sup>113</sup>

For all of these reasons, the leverage that the NBPA expected from the threat of NBA players playing overseas never materialized. What seemed like a negotiating tool in concept turned out to be, in reality, a relatively unattractive alternative path for players—one riddled with logistical flaws and minimal remunerative upside.

### *C. Players' Emotional Reactions and the Racial Overtones of the Negotiations*

Another popular explanation for why the players suffered significant losses in the 2011 Agreement was that they became too emotional during the negotiations.<sup>114</sup> Many commentators believed that the players failed to

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112. *Id.*; Kurt Helin, *European Veteran Warns: This Isn't Like the NBA*, NBCSPORTS (July 22, 2011), <http://probasketballtalk.nbcsports.com/2011/07/22/european-veteran-warns-this-isnt-like-the-nba/>. At least one NBA player, Ty Lawson, had difficulty adjusting to the more physical style of play and even tweeted about his frustration. Kurt Helin, *Ty Lawson Lashes out on Twitter; Adjusting to Europe Not Easy*, NBCSPORTS (Oct. 25, 2011), <http://probasketballtalk.nbcsports.com/2011/10/25/ty-lawson-lashes-out-on-twitter-adjusting-to-europe-not-easy/>.

113. *See, e.g.*, Kurt Helin, *J.J. Hickson Is One Game and Done in Israel*, NBCSPORTS (Nov. 4, 2011), <http://probasketballtalk.nbcsports.com/2011/11/04/j-j-hickson-is-one-game-and-done-in-israel/> (noting how J.J. Hickson's Israeli team, Bnei Hasharon, released him after he was late to practice); Guan Weijia, *Weijia Column: J.R. Smith Adjusting Slowly to China*, SHERIDANHOOPS (Oct. 26, 2011), <http://www.sheridanhoops.com/2011/10/26/weijia-column-j-r-smith-adjusting-slowly-to-china> (explaining J.R. Smith's frustration with a Chinese censorship policy that made it difficult for him to use Twitter); Deron Williams, *D'Will's Turkey Diary, Part 1: The Transition*, ESPN (Oct. 7, 2011), [http://espn.go.com/blog/new-york/new-jersey-nets/post/\\_id/1940/d-wills-turkey-diary-part-1-the-transition](http://espn.go.com/blog/new-york/new-jersey-nets/post/_id/1940/d-wills-turkey-diary-part-1-the-transition) (describing the challenging transition that he and his family faced in Turkey, including finding housing and road travel for away games); Nima Zarrabi, *Austin Daye: "I'm Eager to Come Home"*, HOOPSHYPE (Nov. 10, 2011), <http://hoopshype.com/blogs/zarrabi/austin-daye-im-eager-to-come-home> (noting Austin Daye's troubles with the language barrier and food in Moscow).

114. *See, e.g.*, Kurt Helin, *It Was Players' Idea to Decertify, but Did They Really Understand?*, NBCSPORTS (Nov. 15, 2011), <http://probasketballtalk.nbcsports.com/2011/11/15/it-was-players%E2%80%99-idea-to-decertify-but-did-they-really-understand/> [hereinafter Helin, *Players' Idea to Decertify*]; Matt Moore, *Dear Mr. Thomas: A Response to Etan Thomas' Op-Ed*, NBCSPORTS (Nov. 13, 2011), <http://probasketballtalk.nbcsports.com/2011/11/13/dear-mr-thomas-a-response-to-etan-thomas-op-ed/> [hereinafter Moore, *Dear Mr. Thomas*].

execute a well-devised strategy during the lockout because they allowed NBA Commissioner David Stern's comments to get to them.<sup>115</sup> One reporter characterized the players' approach during the lockout as irrational, comparing them to an innocent man who refused to take a plea bargain in a criminal case even though it would be in his best interest to do so.<sup>116</sup> Indeed, there appears to be a fair amount of evidence to support this characterization.

Even before the lockout began, players seemed to feel insulted and exploited by the NBA owners. In an opinion piece published in late June of 2011, Etan Thomas—the NBPA Executive First Vice President—called the owners greedy for pursuing a hard salary cap, nonguaranteed contracts, and other economic concessions in the 2011 Agreement.<sup>117</sup> Thomas strongly resisted the idea that the owners had conceded anything when they backed off of their push for nonguaranteed contracts.<sup>118</sup> In particular, Thomas stated, “This cannot be a starting point for us. They have in essence tried to insult our intelligence by making us think that something they have ‘given us’ is a slam dunk when in reality its [sic] very far from progress.”<sup>119</sup> As the two sides headed into the lockout, it was evident that some players felt as though the owners were not negotiating in good faith.

As the lockout wore on, players' belief that the owners were exploiting them became more prevalent.<sup>120</sup> In response to the owners' take-it-or-leave-it negotiating style, Tyson Chandler compared the owners to dictators for demanding a 50-50 split in BRI, even after the players had expressed a willingness to give up several percentage points from the 57% they enjoyed under the 2005 Agreement.<sup>121</sup> Towards the end of October 2011, NBPA Executive Director Billy Hunter pursued this theme further by stating that

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115. See Moore, *Dear Mr. Thomas*, *supra* note 114.

116. *Id.*

117. Etan Thomas, *United We Stand*, HOOPSHYPE (June 27, 2011), <http://hoopshype.com/blogs/thomas/united-we-stand>.

118. *Id.*

119. *Id.* Thomas, in addressing the owners' proposal of a flexible salary cap—which Thomas equated to a hard salary cap—wrote, “They are trying to bamboozle us and really it's insulting.” *Id.*

120. See, e.g., Kurt Helin, *NBA Players Take to Twitter to Make Their Case, Call Owners Greedy*, NBCSPORTS (Oct. 20, 2011), <http://probasketballtalk.nbcsports.com/2011/10/20/nba-players-take-to-twitter-to-make-their-case/>.

121. Kurt Helin, *Tyson Chandler Says Owners are Negotiating Like “Dictators”*, NBCSPORTS (Oct. 24, 2011), <http://probasketballtalk.nbcsports.com/2011/10/24/tyson-chandler-says-owners-are-negotiating-like-%E2%80%9Cdictators%E2%80%9D/>.

the players did not want “to be totally exploited” by the owners.<sup>122</sup> Then in November 2011, Etan Thomas again weighed in on the owners’ bargaining position, saying that the owners—whom Thomas labeled as part of America’s wealthiest one percent—felt entitled to tell the players what to do.<sup>123</sup> Several commentators similarly found the owners’ actions to be particularly egregious. For example, one reporter wrote that there was “no ‘bargaining’ going on . . . just extortion.”<sup>124</sup> Another commentator admonished the owners to “stop hurling alley-oops when they’re up by 30 with two minutes left in the fourth quarter, trying to push the margin to 40.”<sup>125</sup> Some analysts even called on the owners to extend an olive branch to the players, allowing the players to save face and accept a deal.<sup>126</sup>

Moreover, many players seriously doubted the owners’ claims that draconian changes were necessary for the 2011 Agreement.<sup>127</sup> These players did not find the necessary correlation between the need to boost struggling teams’ revenue and a dramatic cut in players’ salaries.<sup>128</sup> Here, too, the players’ views were supported by other sources. For example, the NBPA’s consultant, Kevin Murphy—a University of Chicago economics

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122. Kurt Helin, *Union Head Hunter: “We Don’t Want to Be Totally Exploited”*, NBCSPORTS (Oct. 24, 2011), <http://probasketballtalk.nbcsports.com/2011/10/24/union-head-hunter-%E2%80%9Cwe-dont-want-to-be-totally-exploited%E2%80%9D> (quoting Billy Hunter).

123. Etan Thomas, *NBA Labor-Negotiation Questions*, ESPN (Nov. 12, 2011), [http://espn.go.com/espn/commentary/story/\\_/id/7223340/etan-thomas-questions-nba-labor-negotiations](http://espn.go.com/espn/commentary/story/_/id/7223340/etan-thomas-questions-nba-labor-negotiations).

124. Matt Moore, *The Real Problem on the Players’ Side in This Fight*, NBCSPORTS (Nov. 12, 2011), <http://probasketballtalk.nbcsports.com/2011/11/12/the-real-problem-on-the-players-side-in-this-fight> [hereinafter Moore, *The Real Problem*].

125. Kurt Helin, *Talking Decertification, Union Moves with CBA Expert Larry Coon*, NBCSPORTS (Nov. 7, 2011), <http://probasketballtalk.nbcsports.com/2011/11/07/talking-decertification-union-moves-with-cba-expert-larry-coon/> (quoting Larry Coon).

126. *Id.* Even after the two sides reached a tentative deal for the 2011 Agreement, some commentators lamented that the players wound up taking a significant pay cut—finding it undeserved. See, e.g., Dave Zirin, *NBA Lockout Ends and Players Get Played*, NATION (Nov. 28, 2011), <http://www.thenation.com/blog/164822/nba-lockout-ends-and-players-get-played>.

127. See, e.g., Kurt Helin, *Bulls Kyle Korver Calls Lockout a “Shame”*, NBCSPORTS (July 20, 2011), <http://probasketballtalk.nbcsports.com/2011/07/20/bulls-kyle-korver-calls-lockout-a-%E2%80%9Cshame%E2%80%9D>.

128. See Kurt Helin, *NBA Owners Could Vote to Approve Lockout Tuesday*, NBCSPORTS (June 28, 2011), <http://probasketballtalk.nbcsports.com/2011/06/28/nba-owners-could-vote-to-approve-lockout-tuesday/>. Instead, players called on the more financially secure teams to make concessions—through better revenue sharing—to help teams that were struggling financially. See *id.*

professor—agreed with the players’ beliefs about the owners’ financial situation, arguing that the teams’ descriptions of their financial problems were exaggerated.<sup>129</sup> Specifically, Dr. Murphy explained that NBA owners were making money on their investments in their teams even when they experienced budget losses in a given year.<sup>130</sup> He described how the appreciation in the value of the franchise surpassed the yearly cash-flow losses teams experienced.<sup>131</sup>

Dr. Murphy also pointed out that while any team owner who bought in 2007 or thereafter likely suffered operating losses, prior to 2007, owners enjoyed 8% to 9% returns on their investment each year.<sup>132</sup> He thus argued that it was unfair to hold the players accountable for the recent losses when the players were not considered responsible—nor rewarded—for the earlier, more lucrative years.<sup>133</sup> Even if the players should have had to make up for the owners’ losses, Dr. Murphy explained that if the players agreed to take 52.5% of BRI—a figure higher than that at which they ultimately wound up—that concession would more than cover the owners’ losses.<sup>134</sup> While an economist for the NBA owners would have, no doubt, disputed Dr. Murphy’s findings, his research provided important fodder for the players’ strong belief that the owners were taking advantage of them.

Another factor related to the imbalance of power between the owners and the players may well have affected the players’ feelings and actions during the collective bargaining negotiations: race. As described above, both before and during the lockout, players believed that the owners were not negotiating in good faith. The players also felt as though the owners were rigid and sought to unilaterally dictate their preferred terms rather than

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129. See Steve Aschburner, *Renowned Economist Murphy Lends Smarts to NBPA Cause*, NBA (Oct. 27, 2011), [http://www.nba.com/2011/news/features/steve\\_aschburner/10/27/lockout-q-and-a-kevin-murphy/index.html](http://www.nba.com/2011/news/features/steve_aschburner/10/27/lockout-q-and-a-kevin-murphy/index.html).

130. See *id.*

131. See *id.* Dr. Murphy explained why this was an advantageous position for team owners and thus why their arguments regarding financial losses were, in his estimation, disingenuous:

[Y]ou’ve got a tax loss annually on your operating and you’ve got a capital gain at the end that you accumulate untaxed until you sell it and then pay a lower rate. So you get a deferred tax treatment on the gains and an immediate tax treatment on the losses . . . .

*Id.* (quoting Dr. Murphy).

132. See *id.*

133. See *id.*

134. See *id.*



earnestly engage in collective bargaining negotiations.<sup>135</sup> This tension was exacerbated by the fact that the vast majority of owners were white, and a significant majority of players were African American.<sup>136</sup> Some commentators found the dynamic to be reminiscent of the power imbalance between whites and African Americans dating back to slavery.<sup>137</sup> Indeed, after a federal mediator declared that there was “no useful purpose” for continuing mediation between the two sides in late October,<sup>138</sup> journalist Bryant Gumbel made the following provocative editorial comments regarding NBA Commissioner David Stern:

[Stern’s] efforts were typical of a commissioner, who has always seemed eager to be viewed as some kind of modern plantation overseer treating NBA men as if they were his boys. It’s part of Stern’s M.O. Like his past self-serving edicts on dress code or the questioning of officials, his moves are intended to do little more than show how he’s the one keeping the hired hands in their place.<sup>139</sup>

Gumbel took significant criticism from various analysts—from former players to sports reporters—for his comments.<sup>140</sup> However, others found

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135. See Kurt Helin, *Players Union VP Mo Evans Still Talking Tough*, Great., NBCSPORTS (Oct. 13, 2011), <http://probasketballtalk.nbcsports.com/2011/10/13/players-union-vp-mo-evans-still-talking-tough-great/>.

136. See Mike Wise, *NBA Lockout: Negotiations Could Be Hijacked by Racial Perceptions*, WASH. POST, Oct. 21, 2011, [http://www.washingtonpost.com/sports/wizards/nba-lockout-negotiations-could-be-hijacked-by-racial-perceptions/2011/10/21/gIQAXWyc3L\\_story.html](http://www.washingtonpost.com/sports/wizards/nba-lockout-negotiations-could-be-hijacked-by-racial-perceptions/2011/10/21/gIQAXWyc3L_story.html) (explaining that the negotiating table included owners, with the exception of Michael Jordan, who were white and ranged in age from forty to eighty, and players who were 84% African American and in their twenties and thirties).

137. See, e.g., Kurt Helin, *Bryant Gumbel Compares David Stern to “Plantation Overseer”*, NBCSPORTS (Oct. 19, 2011), <http://probasketballtalk.nbcsports.com/2011/10/19/bryant-gumbel-compares-david-stern-to-%E2%80%9Cplantation-overseer%E2%80%9D/> [hereinafter Helin, *Bryant Gumbel Compares*].

138. See Kurt Helin, *Mediator Says “No Useful Purpose” to Continue Labor Talks*, NBCSPORTS (Oct. 20, 2011), <http://probasketballtalk.nbcsports.com/2011/10/20/mediator-says-%E2%80%9Cno-useful-purpose%E2%80%9D-to-continue-labor-talks/> (quoting federal mediator George Cohen).

139. Helin, *Bryant Gumbel Compares*, *supra* note 137 (quoting Gumbel’s closing comments from an episode of HBO’s *Real Sports with Bryant Gumbel*).

140. See, e.g., Kurt Helin, *Add Barkley to List of People Slamming Bryant Gumbel*, NBCSPORTS (Oct. 20, 2011), <http://probasketballtalk.nbcsports.com/2011/10/20/add-barkley-to-list-of-people-slamming-bryant-gumbel/> (describing TV analyst and former NBA player Charles Barkley’s opinion that millionaire basketball players could not be accurately described as slaves and that the Commissioner was merely doing his job); Shaun Powell,

truth in Gumbel's "plantation overseer" remark.<sup>141</sup> Both before and after Gumbel's comments, many players (and those non-players working with the NBPA) made similar off-the-record comments.<sup>142</sup> Indeed, some saw racial tensions running through the entire collective bargaining talks and negotiations.<sup>143</sup> One reported instance of conflict between Commissioner Stern and Dwayne Wade of the Miami Heat demonstrated this view. During negotiations—and several weeks before Gumbel made his comments—Stern allegedly pointed his finger at the players at the bargaining table while making an argument.<sup>144</sup> In response, Wade raised his voice and yelled, "'You're not pointing your finger at me. I'm not your child.'"<sup>145</sup> Players—many of whom felt patronized by Stern—reveled in the news of Wade's rebuke of the Commissioner.<sup>146</sup>

These strong feelings about the racial overtones of Stern's actions should not necessarily come as a surprise to those who follow the NBA, as there have been a number of controversies in recent years. The most prominent one occurred prior to the 2005-06 season when the NBA adopted a dress code that applies to players when sitting in the stands during a game, participating in a media interview or in team or league activities or events,

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*Bryant Gumbel Should've Known Better*, ESPN (Oct. 24, 2011), [http://espn.go.com/new-york/nba/story/\\_/id/7126679/bryant-gumbel-unfairly-labeled-nba-commissioner-david-stern](http://espn.go.com/new-york/nba/story/_/id/7126679/bryant-gumbel-unfairly-labeled-nba-commissioner-david-stern) (defending Commissioner Stern by calling him "the most progressive commissioner in sports" and reminding readers that the Commissioner pushed for African American ownership within the NBA and helped make scores of African American men rich); Mike Raffone, *HBO Sports Must "Get Real" with Bryant Gumbel for NBA Slavery Remarks*, BLEACHERREPORT (Oct. 19, 2011), <http://bleacherreport.com/articles/902079-hbo-sports-must-get-real-with-bryant-gumbel-for-nba-slavery-remarks> (disputing Gumbel's slavery remark based on players' salaries).

141. See generally WILLIAM RHODEN, *FORTY MILLION DOLLAR SLAVES: THE RISE, FALL, AND REDEMPTION OF THE BLACK ATHLETE* (2006) (arguing that systemic racism endures in the world of sports because, despite players' significant salaries, an old dynamic persists: African American athletes supply the talent—but have little control over their professional lives—while the rich white owners and officials retain all of the power).

142. Helin, *Bryant Gumbel Compares*, *supra* note 137; see also Henry Abbott, *David Stern and the Plantation*, ESPN (Oct. 19, 2011), [http://espn.go.com/blog/truehoop/post/\\_/id/32634/david-stern-and-the-plantation](http://espn.go.com/blog/truehoop/post/_/id/32634/david-stern-and-the-plantation) (explaining that persons associated with the players believed that underlying the dispute was the players' determination to correct the historically exploitative relationship between white and African-American men).

143. Abbott, *supra* note 142.

144. Kurt Helin, *Report: Dwyane Wade Yelled at Stern During Labor Talks*, NBCSPORTS (Oct. 1, 2011), <http://probasketballtalk.nbcsports.com/2011/10/01/report-dwyane-wade-yelled-at-stern-during-labor-talks>.

145. *Id.* (quoting Wade).

146. *Id.*

and sitting on the team's bench during the game when they were ineligible to play.<sup>147</sup> The dress code requires players to wear business casual attire during these times and explicitly forbids players to wear popular items such as sleeveless shirts, shorts, T-shirts, jerseys, sunglasses, headphones, headgear, chains, pendants, or medallions.<sup>148</sup>

Stern justified the new dress code by arguing that it was appropriate for players to demonstrate a level of professionalism.<sup>149</sup> However, others viewed the dress code as having racial overtones. One scholar noted that many of the clothes and accessories that NBA players liked to wear were banned under the dress code.<sup>150</sup> The banned attire (clothing associated with hip-hop style) was negatively stereotyped and, at the same time, associated with a particular race—African Americans—and thus “race had to be a motivating factor and contributed to Commissioner Stern’s decision to institute a dress code.”<sup>151</sup> Indeed, while many supporters of the dress code never used the words “black” or “African American” when criticizing the attire that the dress code aimed to eliminate, it was evident that there were concerns that aspects of African American culture—what many conflated with hip-hop dress—were deemed problematic for the NBA’s image.<sup>152</sup> In this regard, the dress code and its supporters sought to limit the impact of young, black players on the NBA culture and to ensure that the players comported with the views and values of the NBA’s predominantly white audience.<sup>153</sup>

NBA players certainly viewed the new dress code in this light. Paul Pierce argued that the dress code targeted “part of our culture,”<sup>154</sup> and one commentator argued that some players believe players should distinguish

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147. Max N. Panoff, Note, *Black, Tie Optional: How the NBA’s Dress Code Violates Title VII*, 8 VA. SPORTS & ENT. L.J. 275, 278-79 (2009). See generally *NBA Player Dress Code*, NBA (Oct. 20, 2005), [http://www.nba.com/news/player\\_dress\\_code\\_051017.html](http://www.nba.com/news/player_dress_code_051017.html) (last visited Aug. 17, 2013).

148. R. Richard Banks, *Class and Culture: The Indeterminacy of Nondiscrimination*, 5 STAN. J. C.R. & C.L. 1, 3 (2009); see also *NBA Player Dress Code*, *supra* note 147.

149. Jeffrey A. Williams, *Flagrant Foul: Racism in “The Ron Artest Fight”*, 13 UCLA ENT. L. REV. 55, 87 (2005).

150. Panoff, *supra* note 147, at 282.

151. *Id.*

152. See Peter Hogarth, *Racial Ideology and Discourse in the NBA: Ron Artest and the Construction of Black Bodies by White America*, STREAM: CULTURE/POLITICS/TECHNOLOGY, Spring 2008, at 53, 62, available at <http://journals.sfu.ca/cpt/index.php/stream/article%20/view/5/5>.

153. *Id.* at 60.

154. Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895, 1904 (2007) (quoting Pierce).

themselves from the negative stereotypes of blacks as being “bad outsiders.”<sup>155</sup> Stephen Jackson echoed this sentiment by claiming that the dress code made “a racial statement” and that aspects of the requirements—like banning players from wearing chains—were directly targeted at black players.<sup>156</sup> These racial tensions were only exacerbated by the perception that white owners, fans, and merchandisers appeared to target the dress of black athletes.<sup>157</sup>

Two other controversies that preceded the 2011 Agreement also help explain why the players felt that race played a role in their negotiations with the owners. The first was when the NBA banned its players from certain nightclubs that it deemed ill-suited for players to attend.<sup>158</sup> If players attended one of these nightclubs, they faced league discipline, including a substantial fine.<sup>159</sup> Many viewed the nightclub ban as being paternalistic and fueling the racial tension between the white owners and African American players.<sup>160</sup> The second controversy involved the NBA’s push for a minimum age for players—nineteen years old or one year after high school graduation—which it successfully negotiated into the 2005 Agreement.<sup>161</sup> Some scholars viewed this rule as racially motivated.<sup>162</sup> Indeed, there is a strong argument that the rule has had a disproportionate effect on black athletes because none of the players that entered the NBA draft straight from high school were white.<sup>163</sup> One scholar argued that the

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155. *Id.* at 1901.

156. *Id.* at 1904 (quoting Jackson).

157. Mark R. Bandsuch, *The NBA Dress Code and Other Fashion Faux Pas Under Title VII*, 16 VILL. SPORTS & ENT. L.J. 1, 19 (2009).

158. Brent D. Showalter, *Technical Foul: David Stern’s Excessive Use of Rule-Making Authority*, 18 MARQ. SPORTS L. REV. 205, 212 (2007).

159. Michael R. Wilson, *Why So Stern?: The Growing Power of the NBA Commissioner*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 45, 57 (2010).

160. See, e.g., Michael McCann, *NBA Activates Its “Security Forces” to Prohibit Players From Frequenting Nightclubs*, SPORTS L. BLOG (Jan. 21, 2007), <http://sports-law.blogspot.com/2007/01/nba-activates-its-security-forces-to.html>.

161. Daniel A. Applegate, Comment, *The NBA Gets a College Education: An Antitrust and Labor Analysis of the NBA’s Minimum Age Limit*, 56 CASE W. RES. L. REV. 825, 829 (2006).

162. E.g., Scott R. Rosner, *Must Kobe Come Out and Play? An Analysis of the Legality of Preventing High School Athletes and College Underclassmen from Entering Professional Sports Drafts*, 8 SETON HALL J. SPORT L. 539, 569-70 (1998); Richard Salgado, *A Fiduciary Duty to Teach Those Who Don’t Want to Learn: The Potentially Dangerous Oxymoron of “College Sports”*, 17 SETON HALL J. SPORTS & ENT. L. 135, 146 (2007).

163. Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 163 (2004).

NBA's various rationales for the minimum age requirement—the long-term financial interest of players, the importance of education, and the immaturity of early draft entrants, and among others—were merely pretextual for the racist intent behind the rule.<sup>164</sup> Players certainly seemed to view the minimum age requirement as being racist.<sup>165</sup>

Understandably, these kinds of recent controversies influenced how players viewed the actions of Commissioner Stern and NBA owners during the collective bargaining negotiations in 2011. However, the racial tension between the players and owners can be traced to an ongoing, underlying power struggle that dates back some fifty years or more. For example, in 1964, NBA players refused to leave their locker room and play in the All-Star game until the NBA recognized the players' union and promised to provide a pension plan.<sup>166</sup> Similar to the players' sentiment in 1964, the players' perspective during the 2011 lockout may have been not only about money, but also about power—in particular, the power of the individual NBA player.<sup>167</sup> As one commentator pointed out,

The teams want to be the brand, the product, the market, the control. They want the players to be the asset, the employee, the robotic function of the system the team structure creates. You can argue [the] end point is about money. But it also speaks to ideological divides over whether the young, yes, in most cases black athlete should have the strength and power to determine his or her own basketball destiny.<sup>168</sup>

Star players such as Kevin Garnett, Carmelo Anthony, and especially LeBron James fought hard to control their own respective destinies and in

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164. Kenneth Casey Allison, *Unconscious Racism and the NBA* 16-22 (Dec. 4, 2009) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1574935](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1574935).

165. *Stern Wants NBA Age Limit Raised to 20*, ESPN (Apr. 13, 2005), <http://sports.espn.go.com/nba/news/story?id=2035132>.

166. Matt Moore, *NBA Lockout: LeBron James and the Kingdom Ruled by Knights*, NBCSPORTS (Oct. 30, 2011), <http://probasketballtalk.nbcsports.com/2011/10/30/nba-lockout-lebron-james-and-the-kingdom-ruled-by-knights/> [hereinafter Moore, *NBA Lockout: LeBron James*].

167. *Id.* ("There's a common mistake made in regards to these labor disputes, that they are about one thing. They are about money. They are about pride. They are about power. They are about labor strength. They are about employer rights. They are about all of these things, and somewhere running as a vein underneath the black, ashen skin of this decades long standoff is this: they are about the power of the individual player.").

168. *Id.*

the process disrupted the status quo in the NBA by leaving one team to join another (either by forcing a trade or via free agency).<sup>169</sup>

James, in particular, received venomous criticism for choosing to leave the Cleveland Cavaliers for the Miami Heat in the summer of 2010.<sup>170</sup> Part of this criticism was likely deserved given the questionable way in which he announced his free agency choice: *The Decision*.<sup>171</sup> At the same time, it is easy to see how some of the criticism may have been viewed as racially motivated. For example, Cleveland Cavaliers owner Dan Gilbert's vitriolic response to James's choice of a new team was met with charges by the Reverend Jesse Jackson that Gilbert had a "slave master mentality" and that Gilbert viewed James as "a runaway slave."<sup>172</sup> Gilbert denied the charges, but one thing was clear: he railed vociferously against James's empowerment as a free agent to choose where he would play basketball and earn his living.<sup>173</sup> Indeed, as one commentator noted, James built upon the power of free agency that was fought for by past NBA stars like Bill Russell and Oscar Robertson, and "showed that a player can enter free agency, and not only go where he wants, but get a sign-and-trade to get the extra year he wants on the deal, and do it alongside two of his best friends."<sup>174</sup> Through his decision, James almost single-handedly shifted the NBA's balance of power from Cleveland to Miami.<sup>175</sup>

Many NBA analysts believed that the owners' frustration with the players' newfound sense of empowerment fueled both the owners' bargaining positions and several of the more controversial points of contention during the lockout.<sup>176</sup> Indeed, one could easily view the owners'

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169. *Id.*

170. See Matt Moore, *Like It or Not, LeBron James' 'Decision' Is All Part of the Plan, and It's Working*, NBCSPORTS (July 7, 2010), <http://probasketballtalk.nbcsports.com/2010/07/07/like-it-or-not-lebron-james-decision-is-all-part-of-the-plan-and-its-working/>.

171. See Henry Abbott, *LeBron James' Decision: The Transcript*, ESPN (July 8, 2010), [http://espn.go.com/blog/truehoop/post/\\_id/17853/lebron-james-decision-the-transcript](http://espn.go.com/blog/truehoop/post/_id/17853/lebron-james-decision-the-transcript).

172. Bill Hutchinson, *Jesse Jackson Slams Cavaliers' Owner Dan Gilbert for Treating LeBron James Like a 'Runaway Slave'*, NYDAILYNEWS (July 12, 2010), <http://www.nydailynews.com/news/national/jesse-jackson-slams-cavaliers-owner-dan-gilbert-treating-lebron-james-runaway-slave-article-1.467775> (quoting Rev. Jesse Jackson).

173. See Letter from Dan Gilbert, Owner, Cleveland Cavaliers to Fans (July 8, 2010), available at [http://www.nba.com/cavaliers/news/gilbert\\_letter\\_100708.html](http://www.nba.com/cavaliers/news/gilbert_letter_100708.html).

174. Moore, *NBA Lockout: LeBron James*, *supra* note 166.

175. *Id.*

176. See Henry Abbott, *The Moment the Talks Fell Apart*, ESPN (Oct. 15, 2011), [http://espn.go.com/blog/truehoop/post/\\_id/32504/the-moment-the-talks-fell-apart](http://espn.go.com/blog/truehoop/post/_id/32504/the-moment-the-talks-fell-apart) (discussing how LeBron James waived the status quo with "The Decision," thus inspiring other players to act with a similar sense of empowerment during the lockout); Boyce Watkins, *Bryant Gumbel*,

desire to shorten player contracts, impose extreme luxury tax penalties, reform Larry Bird free agency rights, and eliminate sign-and-trade contracts as not only related to financial concerns, but also motivated by a desire to collectively regain power and control over the players.<sup>177</sup> When considering such a power struggle, racial implications cannot be overlooked. They add another dimension to the dynamic—one with palpable, historical roots.<sup>178</sup> When viewed in this context, the parties' passionate fight over a few percentage points of BRI, and the players' willingness to lose salary and revenue during the lockout, is more understandable. At the same time, the players' repeated insistence on a "fair deal" also takes on a more complex meaning, with implications reaching beyond the mere economics of the 2011 Agreement.

This context of the players' frustrations and the racial overtones of the collective bargaining negotiations help explain why some viewed the players as emotional to the point of making irrational decisions regarding their approach to the lockout and their bargaining position. Some evidence seems to support this characterization. For example, toward the end of the lockout, the NBPA faced a critical juncture and, by many accounts, acted foolishly. On November 10, 2011, during a time of great unrest within the player ranks,<sup>179</sup> Stern sought to circumvent NBPA leadership and persuade the players directly to accept the owners' latest offer.<sup>180</sup> In a memo that he posted on *NBC.com*, Stern explained the offer as having a 50-50 BRI split, expanding the market for mid-level players, permitting unlimited use of the Bird free agent exception, allowing sign-and-trade contacts for non-taxpaying teams, and permitting "an active free agent market and greater

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*David Stern and the NBA Plantation*, HUFFINGTON POST, Oct. 22, 2011, [http://www.huffingtonpost.com/dr-boyce-watkins/bryant-gumbel-nba-plantation\\_b\\_1021116.html](http://www.huffingtonpost.com/dr-boyce-watkins/bryant-gumbel-nba-plantation_b_1021116.html) ("Both the NCAA and NBA are . . . groups of rich and powerful white men seeking to control the economic options of a group of young black men. . . . David Stern and men like him are accustomed to calling the shots and controlling Black men . . .").

177. Moore, *NBA Lockout: LeBron James*, *supra* note 166 ("It's fine to market those stars, to demand they smile for promos, do all the appearances, act and dress the way the owners need them to in order to make the league more popular. But those same players can't control what happens in the league. That has to be the owners' prerogative, in their minds.").

178. *Id.*

179. See *infra* text accompanying notes 369-397.

180. Kurt Helin, *In Latest Attempt to Sway, David Stern Has Memo for Players*, NBCSPORTS (Nov. 14, 2011), <http://probasketballtalk.nbcsports.com/2011/11/14/in-latest-attempt-to-sway-david-stern-has-memo-for-players/>.

player movement.”<sup>181</sup> Stern hoped, in turn, that the rank-and-file players would pressure the NBPA to convene a vote on the proposed deal.<sup>182</sup>

The NBPA, instead, avoided such a vote and limited discussion of the proposal to team representatives and NBPA executive committee members.<sup>183</sup> Many commentators expected that the NBPA would modify the offer (making it more acceptable to the players), approve the modified offer, and then send it back to the owners for consideration.<sup>184</sup> Or, if it wanted to reject the offer but attempt to gain leverage on the owners, the union could have also begun the lengthier, player-initiated vote on decertification.<sup>185</sup> However, there is no evidence that the union carefully considered these alternatives. Instead—and to the surprise of many—on November 14, 2011, the team representatives rejected the latest offer and started the union decertification process by sending the NBA a notice of disclaimer (stating that it would no longer represent players in the collective bargaining negotiations).<sup>186</sup> Players hired attorneys and became

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181. *Id.*

182. Kurt Helin, *Powerpoint Version of League's Offer Players Will Soon Reject*, NBCSPORTS (Nov. 14, 2011) <http://probasketballtalk.nbcsports.com/2011/11/14/powerpoint-version-of-leagues-offer-players-will-soon-reject/> [hereinafter Helin, *Powerpoint Version*].

183. Kurt Helin, *Stern Gives Players New Ultimatum Offer for 72-Game Season*, NBCSPORTS (Nov. 10, 2011), <http://probasketballtalk.nbcsports.com/2011/11/10/stern-gives-players-new-ultimatum-offer-for-72-game-season/> [hereinafter Helin, *Stern Gives Players New Ultimatum*].

184. Helin, *Powerpoint Version*, *supra* note 182.

185. Helin, *Players' Idea to Decertify*, *supra* note 114. The player-initiated vote on decertification is a different process for decertification than the disclaimer of interest approach. *Id.*

186. See Kurt Helin, *Players Vote to Reject Offer, Decertify Union. Season Likely Doomed.*, NBCSPORTS (Nov. 14, 2011), <http://probasketballtalk.nbcsports.com/2011/11/14/players-vote-to-reject-offer-disband-union-season-likely-doomed/> [hereinafter Helin, *Players Vote to Reject Offer*]. Employees can choose to dissolve their union either through decertification or by a disclaimer of interest. Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales After Brady v. NFL and Anthony v. NBA*, 45 U.C. DAVIS L. REV. 1221, 1255-56 (2012). Decertification requires that 30% or more of union members sign cards stating that they do not want their union to continue to represent them. *Id.* at 1256 n.197. An election is thus held, and if a majority of employees votes to decertify the union, the employees will no longer be represented by the union after the vote. *Id.* A disclaimer of interest, on the other hand, “occurs when a showing has been made that more than 50% of the employees in the union do not wish to be represented by the union.” *Id.* The NBPA was under intense pressure to decertify at this point of the lockout. See Kurt Helin, *Where Things Stand as Kobe, Stars Show up for Union Meeting*, NBCSPORTS (Nov. 14, 2011), <http://probasketballtalk.nbcsports.com/2011/11/14/where-things-stand-as-kobe-stars-show-up-for-union-meeting/> (explaining that the hard-liners within the union claimed



plaintiffs.<sup>187</sup> The NBPA was forced to withdraw its unfair labor practices complaint against the owners, and it was expected that the league would challenge the disclaimer of interest as a sham.<sup>188</sup>

Indeed, those following the lockout viewed decertification as a negotiating tactic on the part of the players to move the owners off of their hardline bargaining stance.<sup>189</sup> The union also had strategic reasons for the disclaimer of interest; it thought that such a move would satisfy the hardline players and agents.<sup>190</sup> Interestingly, many agents that represented players were actually shocked that the union chose the disclaimer of interest method of decertification.<sup>191</sup> One reason for this surprise was that the disclaimer of interest approach proceeds rather quickly—which would seem to be against the players' interest.<sup>192</sup> If the players had, instead, petitioned for a vote on decertification, there would have been a forty-five day period before the actual vote.<sup>193</sup> This time period could have then been used for further negotiations with the owners—with the leverage of the looming decertification vote.<sup>194</sup> Instead, the union may have purposely avoided the player-initiated method for fear that once the players convened for the vote, they would have rejected decertification and accepted Stern's latest proposal—something that union leadership did not want the players to do.<sup>195</sup>

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to have seventy more player signatures on a petition than it needed for a vote to decertify but said that they would wait until the union meeting had occurred before filing the papers).

187. Helin, *Players Vote to Reject Offer*, *supra* note 186.

188. See Kurt Helin, *Fisher, Hunter Send Letter to Players Explaining Process*, NBCSPORTS (Nov. 14, 2011), <http://probasketballtalk.nbcsports.com/2011/11/14/fisher-hunter-send-letter-to-players-explaining-process/> [hereinafter Helin, *Fisher, Hunter Send Letter*]. If the NBPA had been successful in its unfair labor practices complaint, the National Labor Relations Board may have attempted to enjoin the NBA from continuing the lockout. See Grow, *supra* note 3, at 495.

189. See, e.g., Helin, *Fisher, Hunter Send Letter*, *supra* note 188.

190. Matt Moore, *Stern Responds to Allegations He's Not Bluffing by Saying He's Not Bluffing*, NBCSPORTS (Nov. 13, 2011), <http://probasketballtalk.nbcsports.com/2011/11/13/stern-responds-to-allegations-hes-not-bluffing-by-saying-hes-not-bluffing/>.

191. Liz Mullin, *Agents Surprised by Disclaimer, Keep Options Open*, SPORTS BUS. J. (Nov. 21, 2011), <http://m.sportsbusinessdaily.com/Journal/Issues/2011/11/21/Labor-and-Agents/NBA-agents.aspx>.

192. Helin, *Players' Idea to Decertify*, *supra* note 114.

193. *Id.*

194. *Id.*

195. Kurt Helin, *NBA Union Did Not Poll Players Before Taking Big Step Monday*, NBCSPORTS (Nov. 14, 2011), <http://probasketballtalk.nbcsports.com/2011/11/14/nba-union-did-not-poll-players-before-taking-big-step-monday/> [hereinafter Helin, *NBA Union Did Not Poll Players*].

When the media questioned the disclaimer of interest method, union leadership claimed that it was the players' idea to decertify.<sup>196</sup> This response made many question whether the players really understood the ramifications of filing a disclaimer of interest.<sup>197</sup> In fact, one commentator portrayed the player representatives as naïve and unsophisticated, with not many of them "know[ing] the difference between a disclaimer of interest, decertification and 'Dancing with the Stars.'"<sup>198</sup> Some players seemed to validate this view. For example, Paul Pierce—an informal leader among the players behind the push to decertify—when asked whether he agreed with the disclaimer of interest, said that he was not sure if it was the right move.<sup>199</sup> Pierce seemed to defer to the expertise of NBPA Executive Director Billy Hunter and the union's lawyers.<sup>200</sup> More importantly, Pierce later appeared to indicate that the players were frustrated and may have acted rashly without thinking through the decision:

I don't know if [disclaimer of interest is] the right move or [forced] decertification is the right move or sitting at the table is the right move. We weren't getting nowhere at the negotiation table. The players felt like they were giving, giving, giving while the owners were taking all the concessions.<sup>201</sup>

In this regard, the disclaimer of interest decision could easily be viewed as stemming from the players' sense of powerlessness and frustration—and deference to union leadership—rather than from an informed decision-making process. In light of the historic power imbalance between the owners and players and the racial tensions that flared at various points during the negotiations and in the past between the two sides, one might also fairly view the players' decision as a rash and perhaps irrational

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196. Helin, *Players' Idea to Decertify*, *supra* note 114.

197. *Id.*

198. Adrian Wojnarowski, *Stern, Hunter Lose Sight of NBA Season*, YAHOO (Nov. 15, 2011), [http://sports.yahoo.com/nba/news?slug=aw-wojnarowski\\_nba\\_labor\\_players\\_owners\\_111511](http://sports.yahoo.com/nba/news?slug=aw-wojnarowski_nba_labor_players_owners_111511) ("As it usually goes in labor talks, whoever gets the players' ears last can talk them in and out of almost any directive. The agents were locked out, cell phone confiscated at the door, and Hunter had a captive audience with some big fancy antitrust lawyers to make his case.").

199. Marc J. Spears, *Paul Pierce: Players Need to Make Stand*, YAHOO (Nov. 20, 2011), [http://sports.yahoo.com/nba/news;\\_ylt=AnqURQ15UKkkyBGD\\_cg03fG8vLYF?slug=mc-spears\\_paul\\_pierce\\_celtics\\_nba\\_lockout\\_111911](http://sports.yahoo.com/nba/news;_ylt=AnqURQ15UKkkyBGD_cg03fG8vLYF?slug=mc-spears_paul_pierce_celtics_nba_lockout_111911).

200. *See id.*

201. *Id.* (quoting Pierce).

response to the negative emotions they felt about the complicated clash they experienced over the past fifty years.

#### *IV. Alternative, Complementary Explanations*

The foregoing explanations for why the players ended up with such unfavorable terms in the 2011 Agreement are dominant in the public narrative regarding the lockout and its fallout. However, there are also alternative, complementary explanations for the players' subpar results. Research in the fields of labor law, industrial relations, and communications helps provide a robust and insightful framework through which to better understand the folly of the NBPA. Specifically, understanding the role of union democracy and public support—with a special emphasis on an effective media strategy and public relations campaign—helps provide a fuller accounting of the results of the lockout and the 2011 Agreement.

##### *A. Gaining Public Support Through an Effective Public Relations Campaign*

###### *1. Context and Examples*

Industrial relations scholarship provides key insight as to the importance of public support and an effective public relations campaign during collective bargaining and, in particular, during a lockout or strike. Both union leaders and management know that swaying public opinion in their favor oftentimes leads to leverage at the bargaining table.<sup>202</sup> Public support may, in fact, be most important during times of labor strife.<sup>203</sup> Labor

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202. See Michael H. LeRoy, Joshua L. Schwarz & Karen S. Koziara, *The Law and Economics of Collective Bargaining for Hospitals: An Empirical Public Policy Analysis of Bargaining Unit Determinations*, 9 YALE J. ON REG. 1, 4 n.6 (1992) (noting how unions prioritize public support when preparing for a strike, including providing union members with strike manuals that have instructions as to how to win over the public).

203. See GLENN M. WONG, ESSENTIALS OF SPORTS LAW 526 (4th ed. 2010). See generally AMIE E. BERGIN, WHAT EFFECTS DO PUBLIC RELATIONS ACTIONS HAVE ON LABOR DISPUTES? A LOOK AT CORPORATE CAMPAIGNS (Schmidt Labor Res. Ctr. Seminar Paper Ser., 2005), available at [http://www.uri.edu/research/lrc/research/papers/Bergin\\_Campaigns.pdf](http://www.uri.edu/research/lrc/research/papers/Bergin_Campaigns.pdf); *In Labor Strike Situations, PR Powers Both Sides of Dispute*, PR NEWS (PR News Grp., Rockville, Md.), Nov. 25, 2002 [hereinafter *In Labor Strike Situations*], available at <http://www.highbeam.com/doc/1G1-94607164.html> (noting that public sympathy for the union can be used to place pressure on management). During a labor dispute, both sides also communicate with each other through the media in addition to trying to garner public support for their position. See Jim McCafferty, *Labor-Management Dispute Resolution & the Media*, 56 DISP. RESOL. J. 41, 42 (2001) (providing examples where union members used the media to voice dissatisfaction with an employer's offer and the employer communicated

disputes are “[public relations] battle[s] that require the skills of the most savvy communicators,”<sup>204</sup> and “[a]ny union in today’s society that doesn’t have good communication with its members and the public will not survive.”<sup>205</sup> The stakes may be even higher for unions as they enter collective bargaining negotiations because they tend to start at a disadvantage from a public support standpoint, as the general public tends to have a negative view of unions.<sup>206</sup> This public support deficit stems from a gradual decline in union membership over the past forty years and the media coverage of unions that has tended to involve stories of corruption, crime, greed, and violent strikes.<sup>207</sup>

Given the importance of public support, management and labor focus more intently on crafting and executing an effective public relations strategy, though each side often takes a slightly different approach. Management generally tends to stay positive—in an attempt to expand on its built-in advantage with the public’s negative sentiment toward unions—while unions oftentimes go negative by painting management in an unsympathetic light.<sup>208</sup> Unions rely progressively more on public relations campaigns, or “corporate campaigns,” to put pressure on employers because the traditional leverage unions had (the strike) is no longer as effective as it once was.<sup>209</sup> The relative ineffectiveness of strikes has been due to a decline in union membership, the possibility of losing more public support through a strike, and the looming threat of replacement workers.<sup>210</sup>

Accordingly, unions devise public relations campaigns to pressure the employers’ stakeholders—such as its customers, investors, board of directors, lenders, and suppliers—who, in turn, will sway the employers to

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several messages to the union through the media; the employer told the media that it was prepared for a long strike and that a strike would result in a contract that was less favorable to workers; and the employer used the media to leak some details from its “final” offer to the union).

204. *In Labor Strike Situations*, *supra* note 203.

205. WILLIAM J. PUETTE, *THROUGH JAUNDICED EYES: HOW THE MEDIA VIEW ORGANIZED LABOR* 143 (1992) (quoting a communications director for the United Steelworkers union).

206. BERGIN, *supra* note 203, at 2.

207. *See* PAUL F. CLARK, *BUILDING MORE EFFECTIVE UNIONS* 127-28 (2000) (discussing a Gallup poll showing that only 26% of the public had confidence in unions as an institution); Diane E. Schmidt, *Public Opinion and Media Coverage of Labor Unions*, 14 J. OF LAB. RES. 151, 152-53 (1993) (citing to Gallup polls taken from 1947 to 1985).

208. *See In Labor Strike Situations*, *supra* note 203.

209. BERGIN, *supra* note 203, at 2.

210. *See* Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 374-75 (2004).

reach agreement with the unions.<sup>211</sup> These corporate campaigns attempt to seize the public's attention and generate sympathy for the union workers through strategies such as "litigation, regulatory complaints, political appeals, advertisements, press conferences, rallies, and even street theater."<sup>212</sup> Unions also form coalitions with civil rights groups, community organizations, and religious leaders to help increase pressure on the employers' stakeholders.<sup>213</sup> If successful, such corporate campaigns can become more than just an employer-employee matter, rising to a community, regional, state, or even national issue.<sup>214</sup> The broader the media and public attention—assuming it is positive to the workers' position—the greater the leverage the union will have in its collective bargaining negotiations and labor dispute.

Management, on the other hand, usually approaches this negative publicity in one of two ways. First, the employer may respond by adversely portraying the union.<sup>215</sup> Management might imply that the striking workers are greedy and release supporting information showing that the workers are highly paid within the region for that type of work.<sup>216</sup> In addition, the employer may attempt to portray the union members as outsiders or troublemakers—"those people."<sup>217</sup> Second, management may choose not to go negative but instead release factual information that counters the union's corporate campaign attacks.<sup>218</sup>

Two union public relations campaigns stand out as particularly effective and demonstrate what is needed to win over public support and use it advantageously in collective bargaining negotiations. The first is the Justice for Janitors campaign from 1990 to 2000 in Los Angeles.<sup>219</sup> The

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211. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1605 (2002).

212. Michael M. Oswalt, *Steeple Solidarity: Mainline Church Renewal and the Union Corporate Campaign*, 50 J. CATH. LEGAL STUD. 227, 252 (2011).

213. See *id.*

214. See *id.*

215. *In Labor Strike Situations*, *supra* note 203.

216. *Id.*

217. *Id.*

218. See Ryan Ellis, *Unions Use Smear Tactics in 'Corporate Campaigns'*, 63 HUMAN EVENTS 15, 20 (2007), available at <http://www.humanevents.com/2007/04/23/unions-use-smear-tactics-in-corporate-campaigns/> (describing Wal-Mart's creation of a website to post facts designed to refute claims made by a union).

219. Christopher L. Erickson et al., *Justice for Janitors in Los Angeles: Lessons from Three Rounds of Negotiations*, 40 BRIT. J. OF INDUS. REL. 543, 544 (2002) (calling the Justice for Janitors campaign "arguably the single most important organizing success story of the

Justice for Janitors campaign garnered much media attention and gained significant public support through peaceful and orderly protests and rallies strategically located outside of the buildings that the janitors cleaned.<sup>220</sup> The campaign was successful because the janitors' union—the Service Employees International Union (SEIU)—was well-prepared and planned for the campaign far in advance. Even a year before the first strike, SEIU carefully constructed a persuasive public relations strategy by conducting polls and focus groups.<sup>221</sup> The union also considered the greater political and economic context of the labor dispute. For example, despite the economic growth enjoyed by the Los Angeles region—particularly in and around the time of the campaign—there was still a tremendous economic gap between the affluent and the poor in the area.<sup>222</sup> SEIU saw the opportunity to make the janitors symbols of this economic inequality: low-wage, immigrant laborers who worked nights to clean the upscale buildings of the wealthy elite's daytime offices.<sup>223</sup> At the same time that SEIU waged the Justice for Janitors campaign, California passed an anti-undocumented immigrant initiative—Proposition 187—which generated a great deal of sympathy for low-wage, immigrant workers.<sup>224</sup>

The Justice for Janitors' media campaign message of seeking justice for the working poor resonated with the public in Los Angeles's economic and political climate.<sup>225</sup> The media's extensive coverage of the campaign was

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U.S. labour movement in the late twentieth century"). The Justice for Janitors campaign eventually spread to other cities as well. *Id.*

220. Michael M. Oswalt, Note, *The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations*, 57 DUKE L.J. 691, 708 (2007).

221. Erickson et al., *supra* note 219, at 553.

222. *See id.* at 562-63. During this time, Californians also adopted Proposition 210, which raised the minimum wage in the state, and many cities passed living wage ordinances. *Id.* For more background on local living wage ordinances, see David Neumark, *Living Wages: Protection for or Protection from Low-Wage Workers?*, 58 INDUS. & LAB. REL. REV. 27, 28-29 (2004) (detailing various living wage laws in the United States).

223. *See* Erickson et al., *supra* note 219, at 553.

224. *Id.* at 562.

225. *See id.* (noting that "[m]uch of the union's negotiating leverage came from the strong public sentiment supporting the janitors' efforts, not from preventing buildings from being cleaned"). For more information regarding the importance of the political context of union efforts, see Preston Rudy, "Justice for Janitors," Not "Compensation for Custodians": *The Political Context and Organizing in San Jose and Sacramento*, in REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT 133, 134 (Ruth Milkman & Kim Voss eds., 2004) (arguing that the Justice for Janitors' union organizing campaigns in San Jose and Sacramento demonstrated that unions' ability to

sympathetic to the union and its members, as was public sentiment.<sup>226</sup> In response to this public support, elected officials from both political parties and community leaders expressed support for the janitors and even intervened in the dispute.<sup>227</sup> This intense public scrutiny led the employers to resolve the strike with terms that were highly favorable to the janitors.<sup>228</sup>

The second noteworthy union public relations campaign was the Teamsters-UPS strike in 1997. Similar to the Justice for Janitors campaign, the Teamsters union prepared more than a year in advance for the strike.<sup>229</sup> The union surveyed its members and discovered that its membership was concerned about the lack of full-time positions available to them.<sup>230</sup> In response, the Teamsters leadership designed a message to appeal to its members and the public more generally.<sup>231</sup> The union condemned UPS's employment of a substantial (and growing) number of part-time workers and used effective slogans, such as "Part-time America won't work,"<sup>232</sup> and "People don't have part-time children or part-time mortgages,"<sup>233</sup> to communicate their message. These slogans caught the public's attention because the economic recession in the early 1990s had left the general public with a negative view of big business and hostility toward the rapidly increasing incidence of part-time (rather than full-time) jobs.<sup>234</sup> The public feared corporate downsizing and worried that there would be a continued loss of full-time jobs—with wages and benefits to support a family—and a rise, instead, of part-time, low-wage jobs with no benefits.<sup>235</sup> The public was particularly hostile to this trend because it coincided with a rise in corporate profits and a once-again robust economy.<sup>236</sup>

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"strategiz[e] their relationship with the political context" is determinative of the outcome of such campaigns).

226. Erickson et al., *supra* note 219, at 562.

227. *Id.* at 563-64.

228. *Id.* at 564.

229. Kate Miller, *Issues Management: The Link Between Organization Reality and Public Perception*, 44 PUB. REL. Q. 5 (1999).

230. CHRISTOPHER R. MARTIN, *FRAMED!: LABOR AND THE CORPORATE MEDIA* 164 (2004) (explaining that UPS instituted a two-tier wage system that paid part-time workers less than half of the wages of full-time workers, despite these part-time workers working thirty-five or more hours per week).

231. *See id.*

232. *Id.*

233. William Schneider, *A Turning Point for American Labor?*, 29 NAT'L J. 1711 (1997).

234. *See id.* (noting that the union's message "touched on widespread worker insecurities—and resentment of corporate downsizing").

235. *See* MARTIN, *supra* note 230, at 168-69.

236. *See id.* at 168-69, 173.

The Teamsters publicized their message through rallies, press releases, and other events aimed at gaining news coverage.<sup>237</sup> The union also prepared its members to communicate effectively with their customers regarding the union's position.<sup>238</sup> Indeed, the UPS drivers—themselves union members—had face-to-face interactions with customers during deliveries, and these communications helped contribute to the strong public support that the Teamsters were able to garner during the strike.<sup>239</sup> The public support was particularly impressive—polling showed 55% supported the union compared to 27% supporting UPS—given that the public suffered some inconvenience in disruptions in service by the nation's largest shipping company.<sup>240</sup> With such strong public backing, the union was able to pressure UPS to reach a favorable settlement a mere fifteen days after beginning the strike.<sup>241</sup>

As these two examples demonstrate, effective public relations campaigns can help unions gain leverage over management and secure a more desirable outcome for their members. Indeed, these corporate campaigns have been valuable even for unions that have not enjoyed the same kind of national media attention as the Justice for Janitors and Teamsters campaigns.<sup>242</sup> Such success stories demonstrate that preparation is key to the union efforts. In the two examples above, the unions thoroughly researched the employers and the related industries. They also crafted their public relations messaging in light of the political and economic climate at the time. Each union's leadership then educated their respective members about the employer, the industry, the union's positions, and the methods and messages for dealing with the media and the public. The unions next used various strategies—such as face-to-face contacts, rallies, protests, press conferences, and other events aimed at attracting news coverage—for disseminating their message. In doing so, the unions developed and effectively communicated messages that resonated with their members and

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237. Miller, *supra* note 229, at 5-11.

238. BERGIN, *supra* note 203 (citing Frederick Guy, *High-Involvement Work Practices and Employee Bargaining Power*, 25 EMP. REL. 453, 460 (2003)).

239. MARTIN, *supra* note 230, at 171.

240. Schneider, *supra* note 234, at 1711.

241. See MARTIN, *supra* note 230, at 165.

242. See, e.g., Charles Craypo, *Strike and Relocation in Meatpacking*, in GRAND DESIGNS: THE IMPACT OF CORPORATE STRATEGIES ON WORKERS, UNIONS, AND COMMUNITIES 185, 203-04 (Charles Craypo & Bruce Nissen eds., 1993) (describing the Commercial Workers International Union's public relations campaign success against IBP—a meatpacking corporation—in Dakota City, Nebraska).



with the public at large. This public support, in turn, helped these unions secure favorable terms in their new contracts with their employers.

## 2. *The NBPA Public Relations Debacle*

In most respects, the need for a players' union—like the NBPA—to properly prepare and execute an effective public relations campaign during labor strife is no different than that of other unions. Despite the popularity of professional athletes and the ease with which they can access media outlets,<sup>243</sup> the public generally is as unsympathetic to professional athletes during labor disputes as it often is with the union position in other industries.<sup>244</sup> The public commonly views work stoppages in professional sports—whether due to strike or lockout—as related to the greed of both sides (with particular disdain for the players) and thus reacts with resentment and disgust.<sup>245</sup> In particular, the resentment towards the players may be even more acute when the media portrays them as privileged individuals who make their living playing a sport—in contrast to the owners, who are seen as businesspersons.<sup>246</sup> Given this context, it is critical for players' unions like the NBPA to craft a message that will resonate with the general public.

The NBA players faced a predictable deficit in public support when the lockout began. The public had trouble relating to millionaire young men—most of whom were in their twenties—and thus felt little sympathy for them.<sup>247</sup> It certainly did not help that the players—and, more specifically, their salaries—were known (or easily ascertainable) by the public. In contrast, the owners were faceless and their incomes largely unknown.<sup>248</sup>

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243. See DAVID F. PRINDLE, *THE POLITICS OF GLAMOUR: IDEOLOGY AND DEMOCRACY IN THE SCREEN ACTORS GUILD* 3 (1988).

244. See Michelle Hertz, Note, *The National Basketball Association and the National Basketball Players Association Opt to Cap Off the 1988 Collective Bargaining Agreement with a Full Court Press*: In re Chris Dudley, 5 MARQ. SPORTS L. J. 251, 272 n.145 (1995) (explaining that the public had no sympathy for the NFL, MLB, NHL, or the respective players' union in their various bargaining disputes during the mid-1990s).

245. *Id.*

246. See, e.g., Aaron Shepard, Comment, *Football's Stormy Future: Forecasting the Upcoming National Football League Labor Negotiations*, 33 COLUM. J.L. & ARTS 527, 531 (2010) (discussing NFL players in particular).

247. See Kurt Helin, *Love Says Players Want Compromise but Will Not Roll Over*, NBCSPORTS (Aug. 17, 2011), <http://probasketballtalk.nbcsports.com/2011/08/17/love-says-players-want-compromise-but-will-not-roll-over/>.

248. See Kurt Helin, *Stern Goes on the Offensive During Media Tour*, NBCSPORTS (Oct. 14, 2011), <http://probasketballtalk.nbcsports.com/2011/10/14/david-stern-goes-on-the-offensive-during-media-tour/> [hereinafter Helin, *Stern Goes on the Offensive*].

This dynamic helps explain, in part, why the public seemed generally to resent the millionaire players more than the billionaire owners.<sup>249</sup> Part of this public resentment grew from the debate surrounding nonguaranteed contracts. In particular, there was a focus in the media coverage on the “malingerer player”—those players who signed lucrative, long-term guaranteed contracts and then either underperformed or missed many games due to injury.<sup>250</sup> Commissioner Stern certainly fueled this perception in his public relations strategy, as it tended to reinforce the public’s already negative perceptions of the players.<sup>251</sup>

Some players and commentators pushed back against this characterization of the players. NBPA President Derek Fisher argued that while a few players were overpaid, others (like 2010-11 NBA MVP Derrick Rose) were actually paid below their market value.<sup>252</sup> Others argued that it made little sense to blame the players for signing and continuing to collect on contracts to which general managers and owners agreed.<sup>253</sup> Relatedly, some commentators pointed out that the “bad” contracts had no actual effect on the league’s finances because under the 2005 Agreement, the players received 57% of BRI—so the amount of money paid to the players

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249. *See id.*

250. Kurt Helin, *Who Are the Most Overpaid Players in the NBA?*, NBCSPORTS (July 5, 2011), <http://probasketballtalk.nbcsports.com/2011/07/05/who-are-the-most-overpaid-players-in-the-nba/> (listing and explaining one sport writer’s list of players with these types of contracts); Ian Thomsen, *Union President Fisher Maintains Bold Stance in Labor Negotiations*, SI (July 21, 2011), [http://sportsillustrated.cnn.com/2011/writers/ian\\_thomsen/07/21/derek.fisher/index.html?eref=writers](http://sportsillustrated.cnn.com/2011/writers/ian_thomsen/07/21/derek.fisher/index.html?eref=writers) (explaining that players call these types of occurrences “stealing the money”).

251. *See* Andrew Sharp, *NBA Lockout: David Stern Calls Agents Greedy, One Agent Responds*, SBNATION (Nov. 14, 2011), <http://www.sbnation.com/2011/11/14/2560543/nba-lockout-david-stern-agents-greedy>.

252. Kurt Helin, *Derek Fisher Talks Lockout, Sounds Like a Politician*, NBCSPORTS (July 5, 2011), <http://probasketballtalk.nbcsports.com/2011/07/05/derek-fisher-talks-lockout-sounds-like-a-politician/>; Kurt Helin, *Rose Wants to Do Away with Salary Cap. Of Course He Does.*, NBCSPORTS (Oct. 26, 2011), <http://probasketballtalk.nbcsports.com/2011/10/26/rose-wants-to-do-away-with-salary-cap-of-course-he-does/> (noting that Rose earned \$5.6 million during the 2010-11 season in which he was named the league’s most valuable player); *see also* Adrian Wojnarowski, *Salaries Don’t Match Value for NBA Stars*, YAHOO (Sept. 30, 2011), [http://sports.yahoo.com/nba/news?slug=aw-wojnarowski\\_dwyane\\_wade\\_nba\\_lockout\\_093011](http://sports.yahoo.com/nba/news?slug=aw-wojnarowski_dwyane_wade_nba_lockout_093011) (reporting that Los Angeles Lakers owner Jerry Buss stated privately that Kobe Bryant—who made a league-high \$25 million salary for the 2010-11 NBA season—was worth \$70 million per season to the team).

253. Kurt Helin, *Rashard Lewis: Don’t Blame Me for Signing a Huge Contract*, NBCSPORTS (Sept. 13, 2011), <http://probasketballtalk.nbcsports.com/2011/09/13/rashard-lewis-don-t-blame-me-for-signing-a-huge-contract/>.

each year would be the same whether such “bad” contracts were made or not.<sup>254</sup>

The owners, on the other hand, approached this matter differently. The owners downplayed their poor management decisions—in agreeing to these “bad” contracts for malingering players—and, instead, advanced public rhetoric stereotyping the overpaid, underperforming player.<sup>255</sup> As a result, the players’ fight was futile. Even in these instances where the players had good facts or arguments on their side, a combination of the public’s tendency to demonize the players and the ineffectiveness (and perhaps ineptitude) of the NBPA’s public relations campaign strategy spelled doom for the union in the court of public opinion.

Indeed, the NBA (the owners) clearly outmaneuvered the NBPA in the public relations battle and the realm of public opinion. The NBA, in a savvy move, set up a Twitter account—@NBA Labor—in order to communicate directly with fans during the lockout.<sup>256</sup> But perhaps more importantly, the NBA spoke almost exclusively with one voice—that of Commissioner Stern—and with very consistent messaging.<sup>257</sup> Stern was constantly spinning the story of the lockout to the players’ disadvantage.<sup>258</sup> He blamed the players for causing the lockout—despite the lockout being the owners’ decision—and portrayed the NBA as an enterprise struggling

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254. Tim Donahue, *CBA Talk: The System, Not Stupid Contracts, Creates Wasted Payroll*, EIGHTPOINTSNINESECONDS (July 26, 2011), <http://www.eightpointsnineseconds.com/2011/07/the-system-not-stupid-contracts-creates-wasted-payroll/>; Kurt Helin, *Those Terrible NBA Contracts Are Not Why There Is a Lockout*, NBCSPORTS (July 26, 2011), <http://probasketballtalk.nbcsports.com/2011/07/26/those-terrible-nba-contracts-are-not-why-there-is-a-lockout/>.

255. Andrew Sharp, *Rashard Lewis on the NBA Lockout: ‘Talk to the Owner, He Gave Me the Deal’*, SBNATION (Sept. 22, 2011), <http://www.sbnation.com/nba/2011/9/22/2442215/nba-lockout-rashard-lewis-contract-las-vegas>.

256. Tiffany A. Miao, Note, *Access Denied: How Social Media Accounts Fall Outside the Scope of Intellectual Property Law and into the Realm of the Computer Fraud and Abuse Act*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1017, 1019 (2013). The players, on the other hand, did not use social media as effectively and likely even hurt the union’s bargaining position with some of the tweets that individual players sent. See *infra* text accompanying notes 273-276.

257. Michael Rosenberg, *Owner Faction Holds Key to Ending Labor Strife, Salvaging Season*, SI (Sept. 28, 2011), [http://sportsillustrated.cnn.com/2011/writers/michael\\_rosenberg/09/28/lockout/](http://sportsillustrated.cnn.com/2011/writers/michael_rosenberg/09/28/lockout/).

258. See *Lockout Roundtable: Discussing NBA’s Labor Feud, Near Future*, SI (Oct. 14, 2011), <http://sportsillustrated.cnn.com/2011/basketball/nba/10/13/lockout.roundtable/>.

economically.<sup>259</sup> Stern also faulted the players for the parties' inability to reach an agreement and end the lockout, claiming that the players were not serious about negotiations.<sup>260</sup> His arguments and messaging were so effective in public perception that one commentator stated that Stern "cherry pick[ed] facts. . . in a way that [made him sound] more reasonable than the owners actually [were]."<sup>261</sup>

As the lockout wore on, Stern continued to portray the players as unreasonable and pointed to "concessions" that the owners were making in an attempt to make a deal and end the lockout.<sup>262</sup> He pointed to such concessions as retaining guaranteed contracts for players and abandoning the hard salary cap.<sup>263</sup> Seen through another lens, however, the owners had not actually conceded anything because a hard salary cap and nonguaranteed contracts were not included in the 2005 Agreement nor had they been a part of any agreement between the two sides during the negotiations for the 2011 Agreement.<sup>264</sup> Nevertheless, Stern's message seemed to resonate with the public. This may be due, in part, to the fact that the union took a rather civil tone in their public relations campaign and did a poor job of educating, or generating sympathy from, the public.<sup>265</sup> Moreover, the NBPA's general professional restraint seemed to be too weak a response to Stern's "all-out offensive."<sup>266</sup> Even some players could

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259. Kurt Helin, *Stern Pessimistic, Rips Players After Negotiating Session*, NBCSPORTS (Aug. 1, 2011), <http://probasketballtalk.nbcsports.com/2011/08/01/stern-pessimistic-rips-players-after-negotiating-session/> [hereinafter Helin, *Stern Pessimistic*]. For example, Commissioner Stern would point to how expensive franchises were to purchase and the economic losses sustained by many teams. Helin, *Stern Goes on the Offensive*, *supra* note 248. He blamed these circumstances on the fact that the players' salaries went from one billion dollars in 1999 to more than two billion dollars in 2011. *Id.* In framing the debate this way, Stern omitted the fact that player salaries had doubled because league revenue had doubled and the owners had agreed to this split in revenue for players' salaries with the 57% BRI in the 2005 Agreement. *Id.*

260. Helin, *Stern Pessimistic*, *supra* note 259.

261. Helin, *Stern Goes on the Offensive*, *supra* note 248.

262. See Henry Abbott, *The Concessions That Matter*, ESPN (Oct. 7, 2011), [http://espn.go.com/blog/truhoop/post/\\_/id/32359/the-concessions-that-matter](http://espn.go.com/blog/truhoop/post/_/id/32359/the-concessions-that-matter) (quoting Commissioner Stern's comments at a news conference).

263. *Id.*

264. See 2005 Agreement, *supra* note 10.

265. See Dave D'Allesandro, *D'Allesandro: In NBA Lockout, Players' Side Needs to Speak Up*, NJ.COM (Aug. 5, 2011), [http://www.nj.com/nets/index.ssf/2011/08/dallesandro\\_in\\_nba\\_lockout\\_pla.html](http://www.nj.com/nets/index.ssf/2011/08/dallesandro_in_nba_lockout_pla.html).

266. Rob Mahoney, *Players Have Avoided Getting Their Hands Dirty, but Will the PR High Road Pay Off?*, NBCSPORTS (Oct. 15, 2011), <http://probasketballtalk.nbcsports.com/>

not help but acknowledge how effective Stern was: Dwayne Wade described Stern's public relations efforts as "amazing" and stated that "the NBA has done . . . a great job complaining. We haven't done a great job of that so no one sees our side."<sup>267</sup>

While there may be some truth to Wade's statement, the public relations gaffes of several individual players also hurt the NBPA's overall media strategy.<sup>268</sup> The union attempted to avoid such problems within the fifty-six-page instructional "Lockout Handbook" that featured public relations guidelines and talking points, with a reminder to "[p]lease be sensitive about interviews or other media displays of a luxurious lifestyle."<sup>269</sup> Nevertheless, comments like that from Rajon Rondo that he was having the "best summer of [his] life"<sup>270</sup> made it difficult for out-of-work fans—many of whom were still struggling from the effects of the Great Recession—to relate to, and sympathize with, the players. Steve Nash also made an unwise statement when he analyzed the lockout by saying, "You have two wealthy sides arguing over percentage points . . . both sides are arguing for inevitably selfish reasons."<sup>271</sup> While Nash's comment may have been an honest—and perhaps accurate—assessment of the lockout, it only seemed to add to the public perception that the players were petty.

More importantly, the players' efforts to counter and correct Commissioner Stern's public relations offensive were ineffective. The union attempted to reframe the public debate by claiming they merely wanted a fair deal.<sup>272</sup> The players even launched a "Let Us Play" public

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2011/10/15/players-have-avoided-getting-their-hands-dirty-but-will-the-pr-high-road-pay-off/.

267. *Id.* (quoting Wade).

268. *See infra* text accompanying notes 270-271.

269. Howard Beck, *Public Relations Becomes a Concern When NBA Millionaires Spar*, N.Y. TIMES, Aug. 29, 2011, at B13, available at [http://www.nytimes.com/2011/08/29/sports/basketball/nba-players-avoid-displays-of-luxury.html?\\_r=0](http://www.nytimes.com/2011/08/29/sports/basketball/nba-players-avoid-displays-of-luxury.html?_r=0).

270. Gary Washburn, *Rondo Raring to Go: Celtics Guard Has Kept Busy*, BOSTON.COM (Oct. 16, 2011), [http://articles.boston.com/2011-10-16/sports/30286915\\_1\\_rajon-rondo-celtics-guard-lockout](http://articles.boston.com/2011-10-16/sports/30286915_1_rajon-rondo-celtics-guard-lockout) (quoting Rondo).

271. Paul Coro, *Phoenix Suns Star Steve Nash Calls Owners, Players 'Selfish'*, AZCENTRAL (Nov. 2, 2011), <http://www.azcentral.com/sports/suns/articles/2011/11/02/20111102phoenix-suns-steve-nash-nba-lockout.html> (quoting Nash).

272. *See* Kurt Helin, *Players Talk Lockout, Sticking Together at Durant's Event*, NBCSPORTS (Oct. 24, 2011), <http://probasketballtalk.nbcsports.com/2011/10/24/players-talk-lockout-sticking-together-at-durant-s-event/> (quoting Chris Paul as saying that the players "just want[ed] a fair deal"); Max Minsker, *NBA Lockout: Anthony Tolliver Talks to B/R About Potential End to the Lockout*, BLEACHERREPORT (Oct. 31, 2011),

relations campaign on Twitter in the hopes of turning the public's negative sentiment against the owners by blaming the league for the games that had been canceled up until that point (the preseason games).<sup>273</sup> On October 10, 2011, more than one hundred players either tweeted "LET US PLAY #StandUnited" or other similar messages.<sup>274</sup> The next day, Stern canceled the first two weeks of the regular season, and the players again responded on Twitter.<sup>275</sup> In their tweets, many players blamed the owners for the canceled games, thanked the fans for their support, apologized to arena employees who were out of work because of the lockout, and accused Stern of disseminating propaganda and misinformation.<sup>276</sup>

Interestingly, despite this concerted and deliberate effort, the "Let Us Play" campaign did little to increase public sympathy for the players.<sup>277</sup> The NBPA—unlike the SEIU and the Teamsters—had not properly considered the economic climate of 2011. Members of the public, many of whom were struggling to pay their bills in the aftermath of the Great Recession, found the players' argument that they "just wanted to play" entirely unpersuasive.<sup>278</sup> If the players had merely wanted to play, they could have simply accepted the owners' most recent offer—an offer that still would have afforded the players income greater than 99% of Americans.<sup>279</sup> Indeed, it was apparent to most observers that the players wanted to do more than play; they also sought to advance their financial interests—and tried to do so by garnering public support through the public relations campaign.<sup>280</sup> The "Let Us Play" campaign thus came off as disingenuous and proved counterproductive by alienating the public further from the players.<sup>281</sup>

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<http://bleacherreport.com/articles/912706-nba-lockout-anthony-tolliver-talks-to-br-about-potential-end-to-the-lockout> (quoting Anthony Tolliver as saying the same).

273. Kurt Helin, *NBA Players Launch "Let Us Play" Twitter Campaign*, NBCSPORTS (Oct. 10, 2011), <http://probasketballtalk.nbcsports.com/2011/10/10/nba-players-launch-let-us-play-twitter-campaign/>.

274. *Id.*

275. Chris Richardson, *NBA Cancels Regular Season Games, NBA Players React on Twitter*, WEBPRONEWS (Oct. 11, 2011), <http://www.webpronews.com/nba-cancels-regular-season-games-nba-players-react-on-twitter-2011-10>.

276. *Id.*

277. Kurt Helin, *Players Union to Host Meeting in Los Angeles Friday*, NBCSPORTS (Oct. 11, 2011), <http://probasketballtalk.nbcsports.com/2011/10/11/players-union-to-host-meeting-in-los-angeles-friday/>.

278. *Id.*

279. *See id.*

280. *See id.*

281. *See id.*

Later in the lockout, Etan Thomas, the NBPA Executive First Vice President, borrowed rhetoric from the Occupy Wall Street protestors in an editorial in which he claimed that the owners were greedy and that the players did not want to be exploited.<sup>282</sup> Thomas characterized the owners as the top one percent, thus implicitly associating the players with the middle and lower classes (the 99%).<sup>283</sup> He also suggested that the owners wanted a bailout—to use another emotionally charged term from the Great Recession—for their own financial mismanagement of their respective franchises.<sup>284</sup> This exploitation theme and analogy to the Occupy Wall Street movement bordered on the ridiculous, given that the NBA players' incomes squarely placed them in the top one percent of wage earners in America, and did nothing to increase public sympathy and support.<sup>285</sup> In fact, it may well have turned off more members of the public to the union's positions. This may explain why, even when several commentators began to side with the players in the lockout dispute, the players' public relations efforts still seemed to have little impact on the public.<sup>286</sup> Based on comments like Thomas's and the apparent disingenuousness of the "Let Us Play" campaign, the players—with their extravagant salaries—came off as unsympathetic protagonists.<sup>287</sup>

In sum, the NBPA's public relations campaign was flawed for a variety of reasons. Unlike the SEIU and the Teamsters,<sup>288</sup> the NBPA was not well-prepared for the lockout and their media strategy was ill-conceived and poorly executed. While the union leadership attempted to educate members about their public relations approach, players failed to promote a uniform message and said—or tweeted—questionable things that reinforced existing negative public perceptions of the players. Moreover, even when the players were on message, their public relations themes seemed oblivious to the economic climate. In this regard, even when the players had good arguments or facts on their side, their messages did not resonate with the public. The players' public relations efforts were ultimately ineffective and thus did not give the union the leverage it sought in its collective bargaining

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282. Thomas, *supra* note 123.

283. *Id.*

284. *Id.*

285. See Nick Hansen, *NBA Lockout: An Open Letter to NBPA Vice President Etan Thomas*, BLEACHERREPORT (Nov. 21, 2011), <https://bleacherreport.com/articles/948934-nba-lockout-an-open-letter-to-nbpa-vice-president-etan-thomas>.

286. *See id.*

287. *See Moore, Dear Mr. Thomas, supra* note 114.

288. *See supra* Part IV.A.1.

negotiations. In fact, the union's campaign may have ultimately hurt them in the public eye—thus giving the owners even greater leverage—explaining, in part, why the players wound up agreeing to such unfavorable terms in the 2011 Agreement.

*B. Union Democracy*

*1. The Importance of Member Communication and Engagement*

For a union there may be no factor more important in collective bargaining negotiations than mobilizing its rank-and-file members in a contract campaign. Indeed, a union is most formidable when its members are engaged in the collective bargaining process and united in their support of the union's platform and strategy. This reality highlights the importance of union democracy, a theory in industrial relations scholarship that refers to a type of union governance that prioritizes member preferences and gives members considerable influence regarding the direction of the union.<sup>289</sup> To this end, union democracy envisions union members as having, at a minimum, information regarding the work of the union, the ability to communicate their views to other union members and leadership without fear of retaliation, and free elections for the union.<sup>290</sup> Unions are, somewhat by definition, single-party bureaucracies,<sup>291</sup> so the efficacy of union democracy can best be judged by the union's responsiveness to its members' views.<sup>292</sup> Since democratic processes within a union do not necessarily ensure or beget union democracy, one must look to see "whether those [democratic] processes provide the substance of meaningful participation and fairness."<sup>293</sup>

Union democracy is particularly important because labor laws are structured in a way to both support, but also potentially hinder, union member participation. For example, Congress enacted the Labor-

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289. Clyde W. Summers, *From Industrial Democracy to Union Democracy*, 21 J. OF LAB. RES. 3, 9 (2000) (stating that union democracy seeks to ensure that union members "have an effective voice in determining unions [sic] policies and electing union officers") [hereinafter Summers, *From Industrial Democracy*].

290. *Id.*

291. 3 SEYMOUR MARTIN LIPSET, MARTIN TROW & JAMES COLEMAN, *UNION DEMOCRACY: THE INTERNAL POLITICS OF THE INTERNATIONAL TYPOGRAPHICAL UNION* 9 (1956).

292. See Clyde W. Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 MD. L. REV. 93, 95 (1984) [hereinafter Summers, *Democracy in a One-Party State*].

293. Summers, *From Industrial Democracy*, *supra* note 289, at 9.



Management Reporting and Disclosure Act of 1959 (LMRDA)<sup>294</sup>—also referred to as the Landrum-Griffin Act—to address the corruption and labor racketeering that had infected many unions up until that point.<sup>295</sup> The purpose of the Act was to “protect union members from oppressive union leadership while preserving the union’s right to adopt reasonable rules of governance.”<sup>296</sup> In short, LMRDA sought to strengthen union democracy.<sup>297</sup> On the other hand, the principle of exclusive representation in labor law—which affords a union the ability to be the sole negotiator in the collective bargaining context for all workers in a particular industry<sup>298</sup>—seems to de-emphasize members’ power vis-à-vis union leadership and may even depress member participation.<sup>299</sup> Exclusive representation can thus preclude member participation in contract disputes and hinder members’ ability to hold their union leaders accountable.<sup>300</sup>

This seeming tension in labor law helps explain the two dominant forms of collective bargaining: democratic and elitist. Democratic collective bargaining occurs when unions ensure that their members have a “direct and effective voice in the negotiation and ratification of the collective [bargaining] agreement.”<sup>301</sup> In this regard, the democratic model values and promotes union member participation despite the utilitarian arguments against this type of participation.<sup>302</sup> Moreover, democratic collective bargaining provides an incentive for the union leadership to be honest with its members, to communicate with (and persuade) its members regarding

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294. Pub. L. No. 86-257, 73 Stat. 519 (codified at 29 U.S.C. §§ 401-531 (2012)).

295. Michael Goldberg, *Derailing Union Democracy: Why Deregulation Would Be a Mistake*, 23 BERKELEY J. EMP. & LAB. L. 137, 138 (2002).

296. *Messina v. Local 1199 SEIU, Nat’l Health & Human Serv. Emps. Union, AFL-CIO*, 205 F. Supp. 2d 111, 118 (S.D.N.Y. 2002).

297. *See Grand Lodge of Int’l Ass’n of Machinists v. King*, 335 F.2d 340, 344 (9th Cir. 1964).

298. Michael A. McCann, Note, *Illegal Defense: The Law and Economics of Banning High School Players from the NBA Draft*, 1 VA. SPORTS & ENT. L.J. 295, 354 (2002); *see also* National Labor Relations Act, § 9(a), 29 U.S.C. § 159(a) (providing for exclusive representation); Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a “Unique” American Principle*, 20 COMP. LAB. L. & POL’Y J. 47, 47-49 (1998) (citing *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944)) (explaining that section 9(a) allows a union to bind all employees and also precludes employers from bargaining with a minority union or directly with employees).

299. *See* Matthew Dimick, *Revitalizing Union Democracy: Labor Law, Bureaucracy, and Workplace Association*, 88 DENV. U. L. REV. 1, 30 (2010).

300. *Id.*

301. Summers, *From Industrial Democracy*, *supra* note 289, at 11.

302. *See* Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793, 837 (1984).

what it believes to be attainable demands, and to provide opportunities for member participation—even by dissenters—to help build unity within the union.<sup>303</sup>

Elitist collective bargaining, on the other hand, consolidates union power in its leadership—which speaks on behalf of the entire union.<sup>304</sup> This model thus has a small group of union leaders that “articulates demands, forms the bargaining priorities, negotiates with the employer, and concludes a binding agreement.”<sup>305</sup> With this approach, union leaders may seek to resolve the collective bargaining negotiations with the employer by any means necessary: lying to members about the contents of a proposed contract, not pursuing particular demands or simply not putting them in writing, or even making payoffs to particularly influential union members.<sup>306</sup> This is not to say that elitist collective bargaining necessarily precludes all democratic procedures. Indeed, even in this model, union leadership may poll its members when initially forming demands or trying to get “expressions of public support” from them.<sup>307</sup> However, elitist collective bargaining treats union democracy as a means to an end rather than a goal in itself.<sup>308</sup> Therefore, the model of collective bargaining that a union employs—elitist versus democratic—will have implications for the resolution of intra-union conflicts and the collective bargaining process more generally.

While there is not much empirical research on the effects of union democracy, two studies provide some insight into how it influences union campaigns.<sup>309</sup> The authors of these studies started with the hypothesis that a greater degree of union democracy would lead to more congruence between the objectives of union leaders, on the one hand, and union members on the other.<sup>310</sup> In other words, the union’s bargaining demands

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303. *Id.* at 840.

304. *Id.* at 795.

305. *Id.*

306. *Id.* at 840.

307. *Id.* at 795.

308. *See id.*

309. Cheryl L. Maranto & Jack Fiorito, *The Effect of Union Characteristics on the Outcome of NLRB Certification Elections*, 40 INDUS. & LAB. REL. REV. 225 (1987); Jack Fiorito & Wallace E. Hendricks, *Union Characteristics and Bargaining Outcomes*, 40 INDUS. & LAB. REL. REV. 569 (1987).

310. Fiorito & Hendricks, *supra* note 309, at 572; Maranto & Fiorito, *supra* note 309, at 227.

would better reflect member preferences.<sup>311</sup> Both studies found this hypothesis to be true.<sup>312</sup> Interestingly, one of the studies found that a greater degree of union democracy improved non-wage outcomes, but reduced wages when compared to unions with less democracy.<sup>313</sup> The authors noted that their finding was consistent with an industrial relations theory that union leaders tend to overestimate member interest in wage over non-wage issues.<sup>314</sup> The authors thus concluded that greater union democracy influences bargaining outcomes—but more in terms of the “shape,” as opposed to the “size,” of the outcomes.<sup>315</sup>

Despite this study showing that union democracy led to more tailored non-wage outcomes—rather than simply “more” outcomes (as is usually associated with wages)—proponents of union democracy continue to contend that more democratic unions are more effective at collective bargaining than unions that follow the elitist approach.<sup>316</sup> Indeed, the Teamsters-UPS strike can be considered a paradigm of union democracy: an engaged, unified rank-and-file membership helping reap significant benefits in the collective bargaining process.<sup>317</sup> However, other scholars have expressed reservations about union democracy, arguing that it gives union members too much power.<sup>318</sup> Such power, they posit, results in more democratic unions pursuing the rank-and-file objectives—which tend to be motivated by short-term, selfish interests—at the expense of the union’s long-term interests.<sup>319</sup> Moreover, some scholars argue that the general

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311. See Fiorito & Hendricks, *supra* note 309, at 572; Maranto & Fiorito, *supra* note 309, at 227.

312. Fiorito & Hendricks, *supra* note 309, at 582; Maranto & Fiorito, *supra* note 309, at 238 (concluding that more democratic unions were more likely to win certification elections).

313. Fiorito & Hendricks, *supra* note 309, at 580.

314. See *id.*

315. *Id.* at 582.

316. See, e.g., Robert Bruno, *Democratic Goods: Teamster Reform and Collective Bargaining Outcomes*, 21 J. OF LAB. RES. 83, 84 (2000) (arguing that “when unions institute democratic decision-making procedures and practices, they elicit valuable membership input which subsequently increases the capacity of the institution to represent its members’ interest”); Michael J. Goldberg, *In the Cause of Union Democracy*, 41 SUFFOLK U. L. REV. 759, 763 (2008).

317. See Bruno, *supra* note 316, at 84.

318. See, e.g., Clyde W. Summers, *Straw Men of Union Leadership*, 80 YALE L.J. 687, 692 (1971) (reviewing DEREK C. BOK & JOHN T. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* (1968)) [hereinafter Summers, *Straw Men*].

319. *Id.* (discussing how Bok and Dunlop emphasize the “tendency of union members to vote their narrow self-interest” and claim that the democratic process is a “nearly

union membership tends to be more aggressive, less reasonable, and less willing to compromise than union leadership.<sup>320</sup> They likewise argue that union members—emboldened through union democracy—will make “uninformed, unintelligent emotional choice[s].”<sup>321</sup> These scholars find democratic collective bargaining inefficient<sup>322</sup> and prefer an elitist collective bargaining model with union leaders that are “imaginative, efficient, . . . effective,”<sup>323</sup> “enlightened,” and “responsible”—characteristics that are euphemisms for leaders who are not beholden to rank-and-file union membership and are able to take unpopular stances.<sup>324</sup>

Unsurprisingly, advocates for union democracy claim that unions can effectively advocate for member preferences without sacrificing efficiency, bargaining strategy, or long-term union objectives.<sup>325</sup> Such proponents argue against union leadership insulating itself from the rank-and-file union membership.<sup>326</sup> Instead, they believe that union leadership can strike a balance between, on the one hand, soliciting members’ views to help inform union policy and strategy and, on the other hand, setting forth a vision for the union and persuading the members to support policies—even unpopular ones—that benefit the union in the long-term.<sup>327</sup> Indeed, it

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insuperable obstacle[.]” to achieving more efficient, effective leadership and long-range planning).

320. See, e.g., Lucio Baccaro, *Centralized Collective Bargaining and the Problem of “Compliance”: Lessons from the Italian Experience*, 53 INDUS. & LAB. REL. REV. 579, 596 (2000) (challenging the idea that “centralized collective bargaining and workers’ direct control over union policy are basically incompatible” and the assumption that workers are more extreme and aggressive than union leaders); Hyde, *supra* note 302, at 849, 850-51 (discussing the assumption that “national union leaders, insulated from rank-and-file pressure, are more ‘reasonable’ than local leaders or the rank and file itself” and the concern that democratic collective bargaining is inefficient and leads to strikes, rather than compromise). But see THOMAS R. COLOSI & ARTHUR ELIOT BERKELEY, *COLLECTIVE BARGAINING: HOW IT WORKS AND WHY* 105 (3d ed. 2006) (explaining that union members are sometimes less aggressive than the union’s leadership and will accept an offer that the union leadership does not support to avoid layoffs or other cutbacks).

321. COLOSI & BERKELEY, *supra* note 320, at 106.

322. See Hyde, *supra* note 302, at 850-51.

323. Summers, *Straw Men*, *supra* note 318, at 692 (summarizing Bok and Dunlop’s position).

324. Baccaro, *supra* note 320, at 596.

325. Summers, *Straw Men*, *supra* note 318, at 692-93 (“[U]nions . . . can be sensitive to protecting democratic rights and maintaining democratic procedures and still strive for long-term social goals.”).

326. *Id.*

327. See CLARK, *supra* note 207, at 106-08 (stressing the need for effective communication between the membership and leadership of unions); MIKE PARKER &

renders union leadership essentially pointless if they merely carry out members' instructions, particularly when the leaders tend to be more knowledgeable regarding union affairs and devote more of their time to contemplating and crafting union strategy.<sup>328</sup> Therefore, in order to achieve this balance, there must be effective two-way communication between the rank-and-file members and union leadership.<sup>329</sup>

Indeed, it is hard to overstate the importance of leader-member communications within unions. As one scholar notes, "Union leaders have a near monopoly on the channels of communication within the union, they have special knowledge and access to information concerning the union and its policies, and they have opportunities for extensive contacts with members and for asserting leadership."<sup>330</sup> In this regard, to achieve effective intra-union communication, union leaders need to take the initiative to set forth their vision for the union—informed by membership deliberation and input—and persuade members to support those policies.<sup>331</sup> Success will be dictated, in large part, by members' commitment to the proposed plan.<sup>332</sup> In fact, a union achieves its greatest power and influence in collective bargaining negotiations when its members are supportive and engaged.<sup>333</sup> Therefore, union leaders should encourage discussion, hear opposition, and educate members in order to refine and improve a plan while gaining member support for it in the process.<sup>334</sup> Accordingly, effective union democracy necessitates an internal union campaign before proceeding with an external campaign in the context of collective bargaining negotiations.<sup>335</sup>

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MARTHA GRUELLE, *DEMOCRACY IS POWER: REBUILDING UNIONS FROM THE BOTTOM UP* 46-49 (1999). Union leaders can educate their members about the union's long-term interests and convince them to support policies that, while unpopular, advance these interests. Summers, *Straw Men*, *supra* note 318, at 693.

328. PARKER & GRUELLE, *supra* note 327, at 48.

329. See CLARK, *supra* note 207, at 106-08.

330. Summers, *Straw Men*, *supra* note 318, at 693.

331. CLARK, *supra* note 207, at 106.

332. See PARKER & GRUELLE, *supra* note 327, at 48.

333. See Ann C. Hodges, *Avoiding Legal Seduction: Reinvigorating the Labor Movement to Balance Corporate Power*, 94 MARQ. L. REV. 889, 903 (2011) (stating "[w]hen workers are disconnected, their interest and participation wanes and any campaign for change loses power" and "[i]f the union is unable to mobilize its members to support collective action in their own workplace or the political arena, its power in both arenas is limited").

334. PARKER & GRUELLE, *supra* note 327, at 48.

335. See *id.* at 48-49.

Two-way communication is critical for gaining rank-and-file member support, for one-way persuasion alone will be insufficient to secure such support.<sup>336</sup> Union members will feel insulted and disengaged if their preferences have not been discussed and incorporated beforehand into the union's policies.<sup>337</sup> Even unions that follow elitist collective bargaining usually cultivate some rank-and-file member involvement at the start of a negotiation campaign.<sup>338</sup> In fact, leaders in highly bureaucratic unions are still unlikely to ignore membership preferences as they are motivated by a desire to retain their leadership positions and avoid membership loss.<sup>339</sup> Indeed, union leadership needs the support of its members during contract negotiations in order to draw significant crowds for rallies and pickets and to carry on the campaign within the workplace.<sup>340</sup> To this end, many unions distribute surveys before a campaign to ascertain member preferences and build a platform based, at least in part, on their priorities.<sup>341</sup>

However, an initial survey alone is usually insufficient, as members' views are not static and may change over the course of the collective bargaining negotiations.<sup>342</sup> Union leadership must continue to receive feedback from its members throughout the negotiation process.<sup>343</sup> Such comprehensive, ongoing communications between union leaders and members should include "discussions at meetings, letters and columns in newspapers, open-door policies at union offices, e-mail and message centers, meetings with intermediate-level leaders, workplace walk-arounds, 'working' leadership, and social activities."<sup>344</sup> Moreover, effective two-way communication also requires union leaders to provide members with up-to-date, accurate, and complete information using websites, emails, and various forms of social media to communicate about dynamic events that occur within the negotiation process.<sup>345</sup>

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336. *Id.* at 52.

337. *See id.* at 48-49.

338. Summers, *Democracy in a One-Party State*, *supra* note 292, at 105-06.

339. *See id.*

340. PARKER & GRUELLE, *supra* note 327, at 52.

341. COLOSI & BERKELEY, *supra* note 320, at 90-91.

342. *See* CLARK, *supra* note 207, at 109 (noting that members views change during negotiations); PARKER & GRUELLE, *supra* note 327, at 52 (explaining how initial surveys may only provide limited choices and can sometimes merely reflect the strongest and most pervasive views).

343. *See* CLARK, *supra* note 207, at 109.

344. PARKER & GRUELLE, *supra* note 327, at 52.

345. *See id.*

When such intra-union deliberation and discourse precedes and continues throughout collective bargaining negotiations, the likelihood that leadership and member interests will align increases.<sup>346</sup> In fact, such a process can lead to greater membership support—so much so that if union leadership reaches an impasse with management in its negotiations, union members are more likely to support whatever action the union decides to take.<sup>347</sup> However, if union leaders fail to engage their members in robust two-way communication, factions within the union are more likely to form and thus weaken the union's bargaining position.<sup>348</sup> While some internal conflict is inevitable regardless of the level of leader-member communication, more democratic unions enjoy a higher likelihood to resolve conflicts internally and thus present a unified front externally in their collective bargaining negotiations.<sup>349</sup> Moreover, without effective intra-union communication, union leadership may pursue an agenda that runs contrary to the interests of the rank-and-file members.<sup>350</sup> In such circumstances, union leaders run the risk that union members will resort to self-help measures, such as "secondary associations," in order to correct the direction of the union.<sup>351</sup> The potential threat of self-help remedies for union members should provide an incentive for union leaders to maintain open, two-way channels of communication in order to avoid the disruption that oftentimes proves fatal for the union's bargaining position.<sup>352</sup>

Union democracy and intra-union communication appear to be essential components for an effective collective bargaining negotiation. An engaged, well-informed union membership can help union leadership craft a platform that it can then strategically and enthusiastically support. An ill-informed, disengaged membership can lead to an erosion of support for union leadership and ultimately a weaker bargaining position within the negotiations. Therefore, it is incumbent on union leadership to not merely

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346. See COLOSI & BERKELEY, *supra* note 320, at 91.

347. See *id.*

348. Baccaro, *supra* note 320, at 596.

349. Clyde Summers, *Growth of Social Consciousness in Internal Union Affairs*, 83 MONTHLY LAB. REV. 22, 23 (1960).

350. Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501, 512.

351. Dimick, *supra* note 299, at 18-20. Secondary associations are defined as "organized or structured subgroups which while maintaining a basic loyalty to the larger organization constitute relatively independent and autonomous centers of power within the organization." *Id.* (quoting LIPSET ET AL., *supra* note 291, at 15). These groups can undermine union leadership. *Id.*

352. See *id.* at 18-22.

persuade membership of a preordained platform, but to engage them in a deliberation process, communicate with members throughout the negotiations, and forge a strong relationship with the rank-and-file members to strengthen the union's overall bargaining position with management.

## 2. *The NBPA's Catastrophic Intra-Union Blunders*

The importance of union democracy and intra-union communication may have been even greater for the NBPA during the 2011 lockout given that players' unions are unique and more complex than unions in other industries. This is due, in part, to the fact that professional athletes have disparate skills and earning power, unlike members in most other private-sector unions.<sup>353</sup> Professional sports feature an elite class of athletes whose income—both salary from the particular sport and outside monies from endorsements and the like—substantially exceeds that of the average member of their union.<sup>354</sup> Given their celebrity status and the resources to attract top legal counsel and representation, these elite athletes can secure advantageous contract terms without the help of their union. This phenomenon suggests that players' unions rose in these industries to protect and further the interests of the more marginal player, who benefitted from union efforts to raise players' salaries and benefits.<sup>355</sup> However, players' unions remain relevant even to top-tier players, as the union negotiates matters such as the salary cap and luxury tax, which are macro-level issues that affect both individual players and the functioning of the sport more generally.<sup>356</sup>

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353. See Feldman, *supra* note 25, at 847; Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 354-55 (stating “[u]nlike industrial employees, professional athletes do not possess homogenous skills; a wide range of ability and expertise exists among players” and also explaining that a lack of job security and a brief professional career sets the NFLPA apart from other industrial unions). The only other similar private-sector unions would be those in the entertainment industry. See PAUL C. WEILER, *ENTERTAINMENT, MEDIA, AND THE LAW: TEXT, CASES, AND PROBLEMS* 827, 829 (2d ed. 2002) (noting the “huge difference in the market value of superstars . . . and . . . bit players” in the entertainment industry and the “stark disparities in earnings between a few entertainment or sports celebrities and the vast bulk of their fellow team members”). For example, in the early 2000s, Screen Actors Guild members' salaries ranged from less than \$7500 to more than \$5 million annually, with the majority of members earning less than \$7500. See *id.* at 828.

354. PAUL D. STAUDOHAR, *THE SPORTS INDUSTRY AND COLLECTIVE BARGAINING* 7 (2d ed. 1989).

355. See *id.*

356. See WEILER, *supra* note 353, at 827-29.



The effects of a stratified rank-and-file membership in players' unions on the collective bargaining process are clear and manifest themselves in several ways. For example, such income polarization creates a distributional inequality within the union between the elite players and the average player.<sup>357</sup> In this scenario, the average players have access to fewer resources than the elite players, who receive a disproportionate amount of the industry's resources.<sup>358</sup> On the one hand, such income disparity still benefits the average player because the elite players' celebrity status increases the players' union's overall bargaining power and thus leads to more favorable terms for all members.<sup>359</sup> In this regard, income polarization within a players' union involves an "equality-power tradeoff."<sup>360</sup> On the other hand, such stratification can pose great risks to union solidarity that, in turn, threatens to undermine the union's bargaining position.<sup>361</sup> With a heterogeneous membership, the players' union winds up representing various internal constituencies. Sometimes the union advocates for terms that benefit elite players more than average players, and vice versa.<sup>362</sup>

This division in internal constituent interests causes players' unions to lack the singularity of interest and cohesiveness that other private-sector unions enjoy.<sup>363</sup> As a result, the players' union is more likely to find its bargaining position compromised due to a lack of solidarity and unity within its membership.<sup>364</sup> When the interests of union members substantially diverge, the intra-union dynamic can devolve into outright

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357. See STAUDOHAR, *supra* note 354, at 7; see also WEILER, *supra* note 353, at 829 (noting that the "stark disparities in earnings between a few entertainment or sports celebrities and the vast bulk of their fellow team members epitomize[s] what has been happening in the broader 'winner-takes-the-lion's-share' labor market for the last two decades").

358. See STAUDOHAR, *supra* note 354, at 7.

359. See Emily C. Chi, *Star Quality and Job Security: The Role of the Performers' Unions in Controlling Access to the Acting Profession*, 18 CARDOZO ARTS & ENT. L.J. 1, 23-24 (2000) (discussing this parallel dynamic in the entertainment industry with the Screen Actors Guild and Actors' Equity Association).

360. *Id.* at 24.

361. See Lock, *supra* note 353, at 354.

362. *Id.*

363. *Id.*

364. See Kelli Shope, *The Final Cut: How SAG's Failed Negotiations with Talent Agents Left the Contractual Rights of Rank-and-File Actors on the Cutting Room Floor*, 26 J. NAT'L ASS'N ADMIN. L. JUDGES 123, 151-52 (2006) (providing an analogous situation with the Screen Actors Guild).

conflict, particularly with ineffective internal communications.<sup>365</sup> Moreover, given the celebrity culture of professional sports, such internal union conflicts inevitably wind up in media reports—further weakening the union’s position.<sup>366</sup>

This context is a near pinpointed description of what occurred with the NBPA during the 2011 lockout. The players certainly attempted to show solidarity at the beginning of the lockout. Early on, more than fifty players demonstrated their unity and resolve by showing up at a negotiation session wearing matching T-shirts that read “STAND/2011 NBPA Summer Meeting.”<sup>367</sup> Many players also made public statements to the effect that they would hold out until they received a fair deal.<sup>368</sup> However, these initial public signs of unity were belied by later events that demonstrated that the NBPA was riddled with, and divided by, a difference in interests among the players. Moreover, agents representing the players played a powerful and ultimately disruptive role in the negotiations. Finally, union leadership communicated poorly with its members. All of these factors led to distrust and a weakening in the NBPA’s bargaining position.

*a) A Difference in Players’ Interests*

The lockout quickly brought to the forefront the tension and resentment among players caused by the differing interests between the elite players and the average players, as well as between the veteran players and the less-established players. For example, young players doubted whether veteran players—who had already earned a majority of their NBA income—would

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365. See PRINDLE, *supra* note 244, at 3 (describing this dynamic within analogous entertainment industry unions).

366. See *id.* (noting that “any dispute within the guild is likely to wind up not only in the headlines . . . but on the evening television news”).

367. Kurt Helin, *NBA Players Show Up to Labor Talks Wearing “Stand” T-Shirts*, NBCSPORTS (June 24, 2011), <http://probasketballtalk.nbcsports.com/2011/06/24/nba-players-show-up-to-labor-talks-wearing-“stand”-t-shirts/> [hereinafter Helin, *NBA Players Wear “Stand” T-Shirts*].

368. See, e.g., Helin, *Player Reaction*, *supra* note 76 (noting general player sentiment for a willingness to hold out for a fair deal); Kurt Helin, *LaMarcus Aldridge Willing to Lose Season to Get “Fair Deal”*, NBCSPORTS (Aug. 24, 2011), <http://probasketballtalk.nbcsports.com/2011/08/24/lamarcus-aldrige-willing-to-loose-season-to-get-“fair-deal”/> (citing LaMarcus Aldridge’s comments); Kurt Helin, *Durant Says NBA Players Not Going to Give In*, NBCSPORTS (July 1, 2011), <http://probasketballtalk.nbcsports.com/2011/07/01/durant-says-nba-players-not-going-to-give-in/> (citing Kevin Durant’s comments); Kurt Helin, *Jamison Says Players More Unified Than Last Lockout*, NBCSPORTS (July 1, 2011), <http://probasketballtalk.nbcsports.com/2011/07/01/jamison-says-players-more-unified-than-last-lockout/> (citing Antawn Jamison’s comments).

look out for the interests of those just beginning their careers in the league.<sup>369</sup> Given that the average players' career is four and a half years,<sup>370</sup> the younger players were anxious to settle the lockout and continue playing—both to earn money and to further establish themselves in the league.<sup>371</sup> The fact that many veteran and elite players wanted to hold out for a better deal caused great frustration among the younger players.<sup>372</sup>

The lockout also caused friction between the different classes of players. One narrative that pervaded lockout discourse in the popular media was that the NBA's elite players—who generated a significant (and disproportionate) amount of the league's revenues—were, in fact, underpaid given their value to their teams and the league as a whole.<sup>373</sup> In fact, some players' agents, as well as some team owners, advocated for a salary structure more akin to the NFL: where the elite players earn lucrative salaries, while the majority of players earn an amount closer to the league's minimum salary.<sup>374</sup> This suggestion infuriated many of the NBPA's rank-and-file members, who very much sought to preserve the NBA's "middle class"—that is, those players making between seven and ten million dollars per season.<sup>375</sup>

These divergent interests in salary structure likely led the NBPA to keep many of its superstar players out of the bargaining process to avoid sending

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369. See Jason Lloyd, *Cavs' Samuels Would Have Accepted Deal but NBA Players Union Rejects Owners' Offer; Season in Jeopardy*, AKRON BEACON J. ONLINE, Nov. 15, 2011, <http://www.ohio.com/sports/cavs-samuels-would-have-accepted-deal-but-nba-players-union-rejects-owners-offer-season-in-jeopardy-1.245552> (quoting Samardo Samuels, in expressing frustration with Paul Pierce's efforts to disband the union, as saying, "It's easy for Paul Pierce to say that. You've been in the league how long? You've got a decent amount of money saved up, but what about the guys just coming into the league who don't have [anything] saved up?").

370. McCann, *supra* note 43, at 768.

371. Kurt Helin, *Some Players Have Not Felt "In the Loop" with Union*, NBCSPORTS (Nov. 15, 2011), <http://probasketballtalk.nbcsports.com/2011/11/15/some-players-have-not-felt-%E2%80%9Cin-the-loop%E2%80%9D-with-union/>.

372. *Id.*

373. See, e.g., Kurt Helin, *Are NBA's Biggest Stars Underpaid? Actually, Yes.*, NBCSPORTS (Sept. 30, 2011), <http://probasketballtalk.nbcsports.com/2011/09/30/are-nba%E2%80%99s-biggest-stars-underpaid-actually-yes/> (noting that Los Angeles Lakers owner Jerry Buss privately told others that Kobe Bryant was worth \$70 million per season, while Bryant actually made \$25 million during the 2010-11 season).

374. *Id.*

375. *Id.*

inconsistent messages and perhaps exposing an intra-union fracture.<sup>376</sup> Therefore, despite the belief by some players that the involvement of superstars such as Kobe Bryant, Dwayne Wade, and Carmelo Anthony would help the union in its negotiations—given that their earning power and value to the league could give them leverage with the owners—NBPA leadership felt the need to exclude them to keep a consistent, unified message that attempted to resonate with the rank-and-file members of the union.<sup>377</sup> These types of intra-union conflicts ultimately undermined the union's bargaining position and allowed Commissioner Stern and the NBA owners to use such divisions to their advantage.

*b) The Disruptive Role of Players' Agents*

Another point of pressure on the union came from a source absent in almost every other private-sector union: agents. Most, if not all, NBA players have agents who represent them in contract negotiations, endorsement deals, and the like.<sup>378</sup> While agents were not directly involved in the collective bargaining process—that is, they did not attend negotiations between the NBPA and the league—they played an influential role in advising their clients throughout the negotiation process.<sup>379</sup> A couple of months into the lockout, many agents pressed the players they represented to advocate for decertification of the NBPA to create leverage in the players' negotiations with the owners.<sup>380</sup> NBPA leadership recognized the threat posed by the agents' influence and resisted these efforts, claiming that decertification was not ripe in terms of where the negotiations stood and that it should come later, if necessary.<sup>381</sup> In fact, NBPA President Derek Fisher sent a letter to the players on the eve of a players' meeting, assuring them that progress was being made in the

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376. See Kurt Helin, *Is It Time for NBA Stars to Be More Vocal During Lockout?*, NBCSPORTS (Sept. 26, 2011), <http://probasketballtalk.nbcsports.com/2011/09/26/is-it-time-for-nba-stars-to-be-more-vocal-during-lockout>. To be sure, the NBPA may have also been relying on past experience in making this decision, as the involvement of superstars during the 1990 lockout led to other players believing that the superstars were only representing their own interests. *Id.*

377. *See id.*

378. Stacey B. Evans, *Sports Agents: Ethical Representatives or Overly Aggressive Adversaries?*, 17 VILL. SPORTS & ENT. L.J. 91, 98-99 (2010).

379. See Kurt Helin, *Players Union Pushes Back on Agents Talking Decertification*, NBCSPORTS (Sept. 15, 2011), <http://probasketballtalk.nbcsports.com/2011/09/15/players-union-pushes-back-on-agents-talking-decertification/>.

380. *Id.*

381. *Id.*

negotiations with the league.<sup>382</sup> In particular, Fisher specifically addressed the agents' involvement by stating in the letter that none of the agents—who were supposedly concerned about the state of the collective bargaining negotiations—had contacted him about their concerns.<sup>383</sup> Fisher was even more pointed: he intimated that, unlike the NBPA, these disgruntled agents did not have the players' best interest in mind.<sup>384</sup> Fisher closed his letter by imploring the players to “stand with me.”<sup>385</sup>

Had the players followed their agents' advice and forced a vote on decertification at this point in the negotiations—in September 2011—it would have amounted to a vote of no confidence in the NBPA.<sup>386</sup> The consequence, of course, would have been a near fatal blow to the union in its negotiations with the owners, even if the decertification vote had failed.<sup>387</sup> Nevertheless, while Fisher's efforts helped stave off a decertification vote, the agents' role in building such a decertification movement still undermined the union's bargaining position because media reports let the owners and general public know of this internal discord.<sup>388</sup> Moreover, from that point on, the NBPA leadership found itself battling the increasing influence agents had on the players—a problem which continued to weaken its bargaining position the more public the internal union strife became. For example, later that month (September), Fisher again distributed a letter in advance of another players' meeting to assure the players that the union would not “sell [players] out or sell [them] short.”<sup>389</sup> He also reminded them that while the union represented the players in collective bargaining negotiations, no agreement could be completed without their vote.<sup>390</sup> Both of these messages would seem, on their face, to be unnecessary to articulate to union membership. As described further in

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382. Kurt Helin, *Fisher Sends Letter to NBA Players Stating Case, Smacking Agents*, NBCSPORTS (Sept. 15, 2011), <http://probasketballtalk.nbcsports.com/2011/09/15/fisher-sends-letter-to-nba-players-stating-case-smacking-agents/>.

383. *Id.*

384. *See id.*

385. *Id.*

386. *See* Matt Moore, *Leon Rose Joins the Decertification Rebel Alliance*, NBCSPORTS (Sept. 17, 2011), <http://probasketballtalk.nbcsports.com/2011/09/17/leon-rose-joins-the-decertification-rebel-alliance/> [hereinafter Moore, *Leon Rose Joins*].

387. *See id.*

388. *See id.*

389. Kurt Helin, *Union President Fisher Sends Letter to Players Urging Unity*, NBCSPORTS (Sept. 26, 2011), <http://probasketballtalk.nbcsports.com/2011/09/26/union-president-fisher-sends-letter-to-players-urging-unity/>.

390. *Id.*

the next subsection, Fisher's need to convey these messages may be an indication of the NBPA's lack of intra-union communication, planning, and union democracy.

But it may also be an indication of just how influential the agents were in this process, particularly the longer the lockout lasted and more player frustration grew.<sup>391</sup> This appeared to be the case even when some agents seemed to take extreme—and perhaps unrealistic—positions given the realities of the negotiation process. For example, in October 2011, several high-profile agents sent their clients a letter encouraging them not to accept any agreement that changed the BRI percentage allocated to the players below the 57% threshold in the 2005 Agreement or that included any other systemic changes.<sup>392</sup> The agents also believed that the owners would eventually back off of their stance of a 50-50 split in BRI.<sup>393</sup> Again, the union found itself on the defensive. Fisher sent yet another letter to players, claiming that the agents' letter was filled with “misinformation” and “unsupported theories.”<sup>394</sup>

In these different ways, the NBPA was fighting two wars during the 2011 NBA lockout: one with the owners and one with the agents. Throughout the lockout, the agents took a hard-line stance, from pushing for decertification to not wanting to concede any major changes in BRI or other important contract terms to the owners.<sup>395</sup> This tension between agents and the NBPA put players in the awkward situation of being forced to doubt either their union or their agents.<sup>396</sup> However, as the lockout wore

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391. See Kurt Helin, *Agents Talking Labor Deal, but Not Decertification. Yet.*, NBCSPORTS (Oct. 5, 2011), <http://probasketballtalk.nbcsports.com/2011/10/05/agents-talking-labor-deal-but-not-decertification-yet/>.

392. Ric Bucher, *Agents Issue Warning Letter to Clients*, ESPN (Oct. 4, 2011), [http://espn.go.com/nba/story/\\_id/7055538/nba-agents-group-warns-clients-joint-memo](http://espn.go.com/nba/story/_id/7055538/nba-agents-group-warns-clients-joint-memo). But see Kurt Helin, *Top Agents Tell Clients to Reject Any More Givebacks in Labor Talks*, NBCSPORTS (Oct. 3, 2011), <http://probasketballtalk.nbcsports.com/2011/10/03/top-agents-tell-clients-to-reject-any-givebacks-in-labor-deal/> [hereinafter Helin, *Top Agents Tell*] (suggesting that the agents may have advocated for players not to accept a deal with the players' BRI set at below 52%).

393. Helin, *Top Agents Tell*, *supra* note 392.

394. Bucher, *supra* note 392.

395. See Adrian Wojnarowski, *Players Discuss Decertification on Call*, YAHOO (Nov. 3, 2011), [http://sports.yahoo.com/nba/news?slug=aw-wojnarowski\\_nba\\_players\\_lockout\\_110311](http://sports.yahoo.com/nba/news?slug=aw-wojnarowski_nba_players_lockout_110311).

396. See Moore, *Leon Rose Joins*, *supra* note 386 (explaining that Chris Paul, a member of the NBPA executive committee, found himself at odds with his agent, Leon Rose, who was pushing for decertification while Paul was trying to maintain union unity and authority in its negotiations with the owners).

on, the agents were able to gain more player support for their positions.<sup>397</sup> This eventual split in union membership—between the hard-line players (who wanted to hold out for a better deal) and those players who were eager to settle the labor dispute and begin the 2011-12 season—made it more difficult for the NBPA to present a unified front to the media or the owners. Such factionalism—spurred on by the agents—ultimately undermined the NBPA’s bargaining position and helped contribute to the players settling for a weaker set of terms in the 2011 Agreement than many expected.

*c) Distrust of NBPA Leadership and the Botched Decertification Approach*

The NBPA never seemed to have unity among its members, even at the beginning of the lockout. For example, within days of when the lockout began, Shane Battier asked if NBPA Executive Director Billy Hunter was going to take his normal salary during the lockout—alluding to DeMaurice Smith, the executive director of the NFL players’ union, who took a salary of one dollar during the NFL lockout.<sup>398</sup> Battier’s question seemed to evince a lack of trust in—or at least a certain amount of hostility or resentment towards—Hunter and perhaps union leadership more generally. Moreover, despite their players’ public show of support with the “STAND/2011” T-shirts at the first negotiating meeting after the lockout began, attendance at player meetings was lackluster at best.<sup>399</sup> As outside pressures increased, players’ lack of engagement and distrust of NBPA leadership grew.

In late October 2011, a rumor surfaced that NBPA President Derek Fisher and NBPA Executive Director Billy Hunter were at odds.<sup>400</sup> The report claimed that Fisher was willing to take a 50-50 split on BRI and end

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397. *See id.*

398. Kurt Helin, *Battier Asks Union President to Take \$1 Salary During Lockout*, NBCSPORTS (June 30, 2011), <http://probasketballtalk.nbcsports.com/2011/06/30/battier-asks-union-president-to-take-1-salary-during-lockout/>. While never confirmed, reports suggest that Billy Hunter continued to draw his normal salary during the lockout. *See Report: Bill Hunter Scoffs at Notion of Taking \$1 Salary During Lockout*, SPORTINGNEWS (June 30, 2011), <http://www.sportingnews.com/nba/feed/2010-10/nba-labor/story/report-billy-hunter-scoffs-at-notion-of-taking-1-salary-during-lockout>.

399. *See Helin, NBA Players Wear “Stand” T-Shirts*, *supra* note 367.

400. Howard Beck, *N.B.A. Talks Resume (Between Union Officials)*, N.Y. TIMES, Nov. 3, 2011, at B18, *available at* <http://www.nytimes.com/2011/11/03/sports/basketball/nba-talks-resume-between-union-officials.html>.

the lockout, while Hunter wanted to hold out for more.<sup>401</sup> Both denied the rift, but many believed that some of the hard-line players leaked the rumor to put pressure on NBPA leadership to agree to a percentage below 53% BRI for the players.<sup>402</sup> While both Fisher and Hunter sent letters to the players urging unity,<sup>403</sup> the players' lack of trust in their leaders was deepening. A sports reporter picked up on this increasing dissension among the players in an article in which he claimed that Fisher was not representing the players' interests because Fisher hoped to secure a job with the league once he retired from playing basketball.<sup>404</sup> Fisher strongly denied this characterization and, specifically, the existence of any side deals with the league.<sup>405</sup> A few days later, Fisher took another public blow from fellow player Jerry Stackhouse, who said that he did not want Fisher negotiating on his behalf.<sup>406</sup> Finally, even those players who were not in the anti-NBPA leadership or hardliner camp felt distrust towards Hunter as he appeared to make unilateral negotiating decisions without the input of the players.<sup>407</sup>

Commissioner Stern thrived off of this distrust of union leadership and used it to his advantage. At pivotal moments in the negotiations, Stern would paint the NBPA leadership as inept and scare the players with threats

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401. Kurt Helin, *Union Head Billy Hunter Denies Any Rift with Derek Fisher*, NBCSPORTS (Oct. 31, 2011), <http://probasketballtalk.nbcsports.com/2011/10/31/union-head-billy-hunter-denies-any-rift-with-derek-fisher/>.

402. *See id.*

403. Kurt Helin, *Billy Hunter Sends Another Letter to Players Urging Unity*, NBCSPORTS (Nov. 1, 2011), <http://probasketballtalk.nbcsports.com/2011/11/01/billy-hunter-sends-another-letter-to-players-urging-unity/>.

404. Jason Whitlock, *Is Fisher in Stern's Back Pocket?*, FOXSPORTS (Oct. 29, 2011) <http://msn.foxsports.com/nba/story/Whitlock-NBA-lockout-David-Stern-has-Derek-Fisher-in-back-pocket-Billy-Hunter-players-union-not-pleased-102811>.

405. Kurt Helin, *Fisher Thrashes Report, Urges Unity in Letter to Players*, NBCSPORTS (Nov. 1, 2011), <http://probasketballtalk.nbcsports.com/2011/11/01/fisher-thrashes-report-urges-unity-in-letter-to-players/>.

406. Kurt Helin, *Stackhouse Smacks Fisher in Interview; the Union Has Issues*, NBCSPORTS (Nov. 3, 2011), <http://probasketballtalk.nbcsports.com/2011/11/03/stackhouse-smacks-fisher-in-interview-the-union-has-issues/>.

407. *See* Kurt Helin, *Infighting Within Union Spills Over into Media Labor Reports*, NBCSPORTS (Nov. 1, 2011), <http://probasketballtalk.nbcsports.com/2011/11/01/infighting-within-union-spills-over-into-media-labor-reports/> [hereinafter Helin, *Infighting Within Union*] (noting that players were critical when Hunter walked out of a negotiation with the owners when they would not agree to a 52-48 split in BRI in favor of the players).



of even worse deals than the one he was currently proposing.<sup>408</sup> Stern did this in mid-October when he undermined Hunter's credibility by hinting that Hunter had suggested a 50-50 split in BRI—something many players saw as selling them out in their hopes for a 53-47 split in the players' favor—but that Hunter could not convince his union members to agree to the deal.<sup>409</sup> This strategic move coincided with the intra-union conflict—regarding whether to accept a deal or continue to hold out for a better deal—becoming public.<sup>410</sup> Two weeks later, Stern again destabilized the rank-and-file players by announcing that the negotiations had broken down because the union refused to accept less than 52% BRI.<sup>411</sup> Stern threatened to cancel games—which would not be made up—and reduce the owners' offer to 47% of BRI for the players if the players did not accept the latest offer.<sup>412</sup> Despite having not yet missed a paycheck at this point, the players' resolve—and faith in their union—began to crumble. Media reports suggested that many players were willing to agree to a 50-50 BRI split.<sup>413</sup> This was a critical turning point in the negotiations, as the players had previously demanded 54% or 53% of BRI and drawn a line at 52.5% of BRI.<sup>414</sup>

It was at this point that the hard-line players and agents pursued decertification in earnest, without support of union leadership.<sup>415</sup> Fifty players held a conference call with an antitrust lawyer and agreed that they

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408. See, e.g., Kurt Helin, *Stern Tries to Frighten NBA Players into Taking Deal*, NBCSPORTS (Oct. 28, 2011), <http://probasketballtalk.nbcsports.com/2011/10/28/stern-tries-to-frighten-nba-players-into-taking-deal/>.

409. Matt Moore, *Stern: If No Deal by Tuesday, Christmas Games May Be Canceled*, NBCSPORTS (Oct. 13, 2011), <http://probasketballtalk.nbcsports.com/2011/10/13/stern-if-no-deal-by-tuesday-christmas-games-may-be-canceled/>.

410. Rob Mahoney, *First Word From Today's Union Meeting: Some Players Ready to Cave to Owners' Demands*, NBCSPORTS (Oct. 14, 2011), <http://probasketballtalk.nbcsports.com/2011/10/14/players-are-ready-to-cave/> (quoting JaVale McGee as stating, "There's definitely some guys in there saying they're ready to fold, but the majority are willing to stand strong"). McGee later denied making the statement, but it was caught on tape. *Id.*

411. Helin, *Infighting Within Union*, *supra* note 407.

412. *Id.*

413. See Kurt Helin, *Were Fisher, Kobe Down with 50/50 Split? Maybe, as Some Players Are*, NBCSPORTS (Oct. 30, 2011), <http://probasketballtalk.nbcsports.com/2011/10/30/were-fisher-kobe-down-with-5050-split-maybe-but-some-players-are/>.

414. *Id.*

415. Howard Beck, *N.B.A. Talks to Resume Amid Threat to Decertify*, N.Y. TIMES, Nov. 4, 2011, at B10, available at <http://www.nytimes.com/2011/11/04/sports/basketball/nba-talks-to-resume-saturday.html?pagewanted=all>.

would pursue decertification if the union made any further concessions—namely, falling below 52.5% of BRI.<sup>416</sup> While some saw the call as an attempt to give leverage to the union—with the threat of decertification looming<sup>417</sup>—it nevertheless signaled a lack of unity among players and a lack of confidence in NBPA leadership. Perhaps sensing his opportunity to end the lockout on favorable terms for the owners, Stern gave several ultimatums to players in early to mid-November in which he offered deals with a 51% to 49% band of BRI for the players.<sup>418</sup> Stern also claimed that if the players did not accept the deal, the owners would lower their offer to 47% of BRI for the players and either a hard salary cap or a “flex” salary cap.<sup>419</sup> Stern increased the pressure on union leadership by releasing the offer to *USA Today*<sup>420</sup> and posting a memo regarding the offer on *NBC.com*.<sup>421</sup> The players—and thus the union—were terribly divided at this point. Roughly half of the players wanted to vote on the owners’ offers, while the other half pushed decertification as a move to leverage

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416. *Id.* (observing that the hardline players did not want an agreement where teams paying the luxury tax could not use sign-and-trade agreements or the mid-level exception). *But see* Matt Moore, *Not All 50 Players United in Decertification Effort on Reported Conference Calls*, NBCSPORTS (Nov. 5, 2011), <http://probasketballtalk.nbcsports.com/2011/11/05/not-all-50-players-united-in-decertification-effort-on-reported-conference-calls/> [hereinafter Moore, *Not All 50 Players United*] (explaining that the players involved in the conference call were not unified behind the idea of decertification, which could cost the players more than one season, and that decertification was only one of several options discussed during the call).

417. *See* Moore, *Not All 50 Players United*, *supra* note 416.

418. Helin, *Stern Gives Players New Ultimatum*, *supra* note 183 (describing Stern’s November 10, 2011 offer); Kurt Helin, *Choice Before Players: Take Stern’s Offer or Decertify*, NBCSPORTS (Nov. 6, 2011), <http://probasketballtalk.nbcsports.com/2011/11/06/choice-before-players-take-stern%E2%80%99s-offer-or-decertify/> (detailing the Stern’s November 6, 2011 offer, including “a mini mid-level of about \$2 million for teams paying the luxury tax, no sign-and-trades for taxpayers, and a \$1 repeater tax”).

419. Matt Moore, *David Stern Sets Ultimatum for Players: Accept Deal by Wednesday or Offer Gets Worse*, NBCSPORTS (Nov. 6, 2011), <http://probasketballtalk.nbcsports.com/2011/11/06/david-stern-sets-ultimatum-for-players-accept-deal-by-wednesday-or-offer-gets-worse/> (describing Stern’s ultimatum).

420. Helin, *Powerpoint Version*, *supra* note 182.

421. Kurt Helin, *In Latest Attempt to Sway, David Stern Has Memo for Players*, NBCSPORTS (Nov. 14, 2011), <http://probasketballtalk.nbcsports.com/2011/11/14/in-latest-attempt-to-sway-david-stern-has-memo-for-players/> (detailing Stern’s description of the offer as having a 50-50 BRI split, expanding market opportunities for mid-level players, permitting “unlimited use of the Bird Exception,” allowing sign-and-trade agreements for non-taxpaying teams, and permitting “an active free agent market and greater player movement”).

their negotiations.<sup>422</sup> The NBPA leadership avoided a vote on the owners' proposals, confining its discussion only to team representatives and executive committee members.<sup>423</sup>

Many thought that the union would modify (and then approve) the offer and send it back to the owners—bringing the two sides closer to resolution.<sup>424</sup> However, as described in Part II.C., the NBPA team representatives and executive committee members rejected the owners' latest offer and voted to begin the decertification process by sending a notice of disclaimer to the NBA.<sup>425</sup> While the union leadership thought that such a move would appease the hard-line players and agents, it was met with shock because the union chose the disclaimer of interest method of decertification.<sup>426</sup> If the goal of moving toward decertification was to gain leverage on the owners, the union's move was understandably questionable because the disclaimer of interest approach proceeds rather quickly—which was not necessarily in the players' best interest.<sup>427</sup> By contrast, the players could have petitioned for a vote on decertification, which would have provided a forty-five day negotiating window and the leverage they were seeking.<sup>428</sup> Perhaps the union leadership chose the disclaimer of interest route worrying that the players would vote against decertification and accept the latest owners' offer—an outcome the NBPA leadership wanted to avoid.<sup>429</sup> At this point, the media questioned the union's strategy,<sup>430</sup> and it became clear that the players did not really understand the ramifications of the disclaimer of interest approach compared to a vote on decertification. It seemed that the disclaimer of interest decision stemmed from a sense of powerlessness—and overt exclusion of the rank-and-file players—rather than an informed decision-making process.

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422. See Kurt Helin, *NBA Players Reject Stern's Ultimatum, Want More Negotiations*, NBCSPORTS (Nov. 8, 2011), <http://probasketballtalk.nbcsports.com/2011/11/08/nba-players-reject-stern's-ultimatum-want-more-negotiations/> (noting player interest in voting on the owners' proposals); Kurt Helin, *Tolliver Admits Union Membership Divided on Next Move*, NBCSPORTS (Nov. 8, 2011), <http://probasketballtalk.nbcsports.com/2011/11/08/tolliver-admits-union-membership-divided-on-next-move/> (describing player division over decertification or voting on the owners' proposal).

423. Helin, *Stern Gives Players New Ultimatum*, *supra* note 183.

424. See, e.g., Helin, *Powerpoint Version*, *supra* note 182.

425. See *supra* text accompanying notes 167-188.

426. See *supra* text accompanying notes 189-195.

427. See Helin, *Players' Idea to Decertify*, *supra* note 114.

428. *Id.*

429. See Helin, *NBA Union Did Not Poll Players*, *supra* note 195.

430. *Id.*

The union leadership was understandably criticized for excluding its general membership from the decision-making process, particularly at a key moment like the decertification decision. Some players complained publicly about being excluded from the decertification and disclaimer of interest meeting.<sup>431</sup> The NBPA leadership defended itself by stating that it was the union's role to decide what proposal, if any, it should present to the players, because the leadership was savvier than the general membership in identifying a good deal.<sup>432</sup> This statement clearly showed that the union believed in an elitist form of collective bargaining rather than democratic collective bargaining. However, the union's explanation still did not fully account for the general membership marginalization. Team representatives were theoretically empowered to act on behalf of their teammates, but some team representatives failed to discuss the disclaimer of interest matter with their teammates before the vote.<sup>433</sup> Moreover, some team representatives did not even have current phone numbers for the teammates they represented.<sup>434</sup> In these regards, many in the union's general membership were not afforded an opportunity to give their input at critical moments of the negotiation process, nor did they receive information regarding various proposals and potential responses.

*d) Poor Intra-Union Communication and a Lack of Union Democracy*

On November 26, 2011—twelve days after the union voted to dissolve—the owners and players reached the agreement that became the 2011 Agreement.<sup>435</sup> However, from the players' standpoint, the terms were no better than many of the previous proposals, and the players wound up conceding on many key terms that shifted significant revenue from the

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431. *Id.* (citing Kevin Martin, who argued that players should have had a vote "because we're all grown men and it's time for players to control their career decisions, and not one player per team").

432. See Henry Abbott, *Union Makes Big Move Without Polling Members*, ESPN (Nov. 14, 2011), [http://espn.go.com/blog/truhoop/post/\\_id/33289/union-makes-big-move-without-polling-members](http://espn.go.com/blog/truhoop/post/_id/33289/union-makes-big-move-without-polling-members). But see Moore, *supra* note 124 (noting that the NBPA leadership likely kept the rank-and-file union members uninformed and at a distance so that they would not realize how badly the negotiations with the owners were going).

433. Kurt Helin, *Lakers Steve Blake Said He Did Not Support 50/50 Deal*, NBCSPORTS (Nov. 16, 2011), <http://probasketballtalk.nbcsports.com/2011/11/16/lakers-steve-blake-said-he-did-not-support-5050-deal/> [hereinafter Helin, *Blake Did Not Support 50/50 Deal*].

434. *Id.*

435. Mike Bresnahan, *NBA Players, Owners Reach Tentative Agreement to End Lockout*, L.A. TIMES, Nov. 26, 2011, <http://articles.latimes.com/2011/nov/26/sports/la-sp-nba-labor-20111126>.

players to the owners. One compelling explanation for the ineffectiveness of the NBPA—and the players’ negotiation efforts more generally—is the lack of union democracy within the NBPA and the poor communication between union leadership and players. While the NBPA attempted to give its members information regarding the lockout before it even began—through the “Lockout Handbook”<sup>436</sup>—there is very little evidence that the union communicated effectively with its members. In fact, the information known publicly suggests the opposite. For example, team representatives did not adequately communicate with their teammates during negotiations.<sup>437</sup> From media accounts, it did not appear as though the union organized regular conference calls, provided frequent progress updates, or explained current strategy to the players.<sup>438</sup> Productive intra-union communication is critical for the success of the union, but the NBPA seemed so ineffective in its internal communications strategy that most players received their information regarding the negotiations through the media.<sup>439</sup>

One reason for the NBPA’s poor intra-union communication may be its embrace of the elitist form of collective bargaining, where the leadership speaks on behalf of the entire union with minimal rank-and-file involvement.<sup>440</sup> However, even in highly bureaucratic unions like the NBPA, there is a role for union democracy and member engagement.<sup>441</sup> Nevertheless, the NBPA leadership did not communicate with its members nor seek to engage them in any meaningful fashion. Indeed, the union leaders strategically excluded the rank-and-file players at key points in the negotiation.<sup>442</sup> In this way, the NBPA seemed to embrace the “by any means necessary” approach to elitist collective bargaining, alienating and

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436. Levinson, *supra* note 77.

437. Helin, *Blake Did Not Support 50/50 Deal*, *supra* note 433.

438. Marc J. Spears, *Paul Pierce: Players Needed to Make Stand*, YAHOO (Nov. 20, 2011), [http://sports.yahoo.com/nba/news;\\_ylt=AnqURQ15UKkkyBGD\\_cg03fG8vLYF?slug=mc-spears\\_paul\\_pierce\\_celtics\\_nba\\_lockout\\_111911](http://sports.yahoo.com/nba/news;_ylt=AnqURQ15UKkkyBGD_cg03fG8vLYF?slug=mc-spears_paul_pierce_celtics_nba_lockout_111911) (quoting Paul Pierce: “A lot of [the players] are on the outside looking in. They kind of followed the negotiations on [television]”).

439. *E.g., id.*; Matt Moore, *Nazr Mohammed Was Doing So Well, Too*, NBCSPORTS (Nov. 12, 2011), <http://probasketballtalk.nbcsports.com/2011/11/12/nazr-mohammed-was-doing-so-well-too/> (describing one player’s publically negative reaction to a proposal that had already been rejected in the negotiations themselves).

440. *See* Abbott, *supra* note 432; Hyde, *supra* note 302, at 795.

441. *See* Hyde, *supra* note 302, at 795.

442. Abbott, *supra* note 432.

marginalizing many players and ultimately undermining their negotiation efforts.<sup>443</sup>

What the NBPA may have needed was better union democracy, which could have provided more meaningful ways for the players to effectively voice their concerns in the negotiations with the owners. This is not to say that the NBPA leadership should have merely carried out the players' instructions, particularly when the union's leaders were more knowledgeable about the contract terms in the various proposals, as well as the collective bargaining process in general. However, the union leadership did not engage its membership in a deliberative, communicative process—either before or during the lockout—to gauge members' priorities and interests, and missed an opportunity to build unity through such a process. To be sure, there were some signs of intra-union communication and union democracy. For example, most players seemed to have adopted the mantra of wanting a “fair deal,” and the union was able to engage some of the players in a public show of support with the “STAND/2011 NBPA Summer Meeting” T-shirts.<sup>444</sup> Nevertheless, these modest efforts fall short of the limited union democracy efforts in which even unions adhering to elitist collective bargaining engage.<sup>445</sup>

More importantly, the lack of union democracy hurt union leadership throughout its negotiations. While the players used the buzz term “fair deal,”<sup>446</sup> the union clearly had not facilitated deliberative conversations among its membership to build consensus as to what a “fair deal” would look like. The union had not educated the players as to what it might cost them to achieve this “fair deal”—like an extended lockout—and the sacrifices necessary to achieve it. Nor had the NBPA leadership realistically framed the dispute—and the financial and other concessions that would likely need to be made to the owners—to help manage players' expectations and build consensus around a negotiation plan and contract terms on which most players could agree. While not all of the NBPA's actions were publicized, it appeared as though there were not the type of ongoing communications between the NBPA leadership and the rank-and-

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443. See Hyde, *supra* note 302, at 840.

444. Helin, *NBA Players Wear “Stand” T-Shirts*, *supra* note 367.

445. See Hyde, *supra* note 302, at 840.

446. See, e.g., *Report: NBA to Cancel More Games*, ESPN (Oct. 25, 2011), [http://espn.go.com/nba/story/\\_/id/7146097/nba-lockout-2011-league-cancel-two-more-weeks-regular-season-according-report](http://espn.go.com/nba/story/_/id/7146097/nba-lockout-2011-league-cancel-two-more-weeks-regular-season-according-report).

file players that mark successful union collective bargaining efforts.<sup>447</sup> In short, the union leadership failed on a number of fronts: setting forth a vision for the union; working with its members to educate them; encouraging union members to help inform and shape the process; and ultimately leading the players towards coalescing around a unified, single objective.

One could argue that the NBPA leadership was not solely to blame for the general membership being uninformed and disengaged. Indeed, at least one commentator has argued that the rank-and-file players should have taken more ownership of their role in the collective bargaining negotiations.<sup>448</sup> He claimed that the players should have demanded more communication from the union leadership, taken efforts to better understand the terms of the different proposals that the owners and union presented, and insisted on demanding a vote on decertification.<sup>449</sup> Moreover, player meetings were sparsely attended, even though all players were invited.<sup>450</sup> However, one need only look to the quintessential example of the decertification vote—where the union leaders explicitly chose not to allow players to vote—to see how disengaged and uninformed players were throughout the process due to the NBPA leadership's belief in elitist collective bargaining.

Two-way communication within a union is critical for its success in collective bargaining negotiations, yet the NBPA lacked this important element. It is unsurprising, then, that many players felt insulted by, and disengaged from, their union, as their preferences were not being heard nor were they ever really solicited. This faulty approach on the part of union leadership only exacerbated the problems created by divergent interests in a stratified union like the NBPA. While it is true that division in member interests can likely lead to a lack of solidarity within a union like the NBPA, the union leadership did nothing to help resolve such internal conflicts.<sup>451</sup> Moreover, the NBPA's elitist approach also did not properly account for the problematic—yet predictable—role that agents played in the process. By failing to build unity and consensus among the players, the

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447. Cf. PARKER & GRUELLE, *supra* note 327, at 52 (emphasizing the two-way nature of communication in an effective union).

448. Moore, *The Real Problem*, *supra* note 124.

449. *Id.*

450. Mark Medina, *NBA Lockout: Uninformed Players Should Blame Themselves*, L.A. TIMES, Nov. 15, 2011, <http://lakersblog.latimes.com/lakersblog/2011/11/nba-lockout-players-uninformed-about-lockout-proceedings-only-have-themselves-to-blame-.html>.

451. See Lock, *supra* note 353, at 354.

NBPA leadership helped create the opportunity for agents to divide the players along lines that reinforced player stratification. It is no wonder that there was such obvious player distrust of, and resentment toward, the NBPA leadership.

The lack of intra-union communication and union democracy ultimately spelled doom for the players. Without effective communications and a unified membership, the NBPA was left vulnerable to manipulation by both agents and Commissioner Stern. Indeed, during key points of the negotiations, Stern was incredibly effective in using threats and ultimatums to further divide the players and force the union into unfavorable bargaining positions. Had the players felt invested and empowered in the collective bargaining process, the NBPA would likely have had a better chance at unifying the players around a single goal and maintaining a stronger bargaining position. However, in light of the union infighting and divisions that occurred due to poor intra-union communication and a lack of union democracy, the players lost much of their bargaining power and leverage and were forced to agree to such unfavorable terms in the 2011 Agreement.

#### *V. Conclusion*

When the NBA lockout began in the summer of 2011, most analysts predicted that the players would need to make some concessions in order to change the league's outdated economic structure. Nonetheless, the extent of the concessions made by the NBPA in the new 2011 Agreement was unexpected. Two conventional explanations offer helpful insight as to why this result occurred. NBA players did not prepare well financially for an extended lockout and thus felt compelled to sacrifice their long-term interests for the short-term resolution of collecting a paycheck again. Commentators also noted that players became (too) emotional in their negotiations, especially in light of the racial overtones that marked the historic and current relationship between players and team owners. Both of these explanations offer a good, but only partial, account of why the players accepted such a poor deal for themselves.

This article has argued that a more complete account of the negotiations surrounding the 2011 Agreement should include a closer look at the structure and operations of the players' union. As research in the fields of communications and industrial relations has shown, union democracy, intra-union communications, and effective public relations have been crucial elements of successful negotiations for workers in the past. By contrast, the NBPA suffered from poor, and somewhat exclusionary, relationships with its members and launched mostly ineffective (and, at



times, downright out-of-touch) corporate campaigns. Against this weakened position of the union, Commissioner Stern was able to take quick and effective advantage to gain most, if not all, of the concessions that the owners wanted.

The lessons that emerge from this expanded analytical framework are relatively straightforward, especially for players' unions in light of the NBPA's experience, but also for other private-sector unions. Unions must better prepare their members for an extended labor dispute and channel members' negative emotions toward employers to cultivate a greater sense of solidarity. They must also recognize their relatively unpopular starting position and work to craft an effective public relations strategy that will generate public support for workers and apply pressure on employers. At the same time, unions must also be mindful of the importance of communication and participation among their members to avert problems stemming from lack of information and disengagement. Moreover, research indicates that union democracy tends to enhance nonwage outcomes, a point that may be useful for addressing the racial dynamics of the NBA.

To be sure, abiding by these lessons may not always bring about substantial gains for labor unions and their members. Much of what drives the outcomes of collective bargaining negotiations, in the NBA and elsewhere, is the economics of the industry. On the other hand, as this analysis of the 2011 Agreement demonstrates, players and workers can end up agreeing to terms that are less favorable than they could be when they fail to plan for—and properly execute a strategy regarding—certain predictable issues. Indeed, it appears that such future planning is critical in the union's ability to secure a "fair deal" instead of settling for a substandard one.